MEMORANDUM DECISION

IN THE
Court of Appeals of Indiana

David Barton, Jr.,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 24, 2024

Court of Appeals Case No.
23A-CR-2471

Appeal from the Clark Circuit Court

The Honorable Nancy Glickfield, Judge

Trial Court Cause No.
10C03-2107-CM-954

Memorandum Decision by Judge May
Judges Vaidik and Kenworthy concur.

May, Judge.

[1] David Barton, Jr., appeals following his convictions of Class A misdemeanor resisting law enforcement[1] and Class B misdemeanor criminal mischief.[2] Barton presents three issues for our review, which we revise and restate as:

1. Whether the trial court erred in denying Barton's motion for a directed verdict;

2. Whether the trial court violated Barton's right to due process by failing to give him an opportunity to request adjournment before pronouncing sentence; and

3. Whether Barton's sentence is inappropriate considering the nature of his offenses and his character.

We affirm and remand.

Facts and Procedural History

[2] During the afternoon of July 24, 2021, Officer Daniel Karr of the Clarksville Police Department was dispatched to a house on Akers Avenue in Clarksville, Indiana. The dispatch asked Officer Karr to contact a suspicious person described as "a white male wearing shorts and no shirt." (Tr. Vol. 2 at 9.)

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[1] Ind. Code § 35-44.1-3-1(a)(3).

[2] Ind. Code § 35-43-1-2(a).

Officer Karr was wearing his police uniform and driving a marked police vehicle when he responded to the call. As Officer Karr approached the residence, he observed the mailbox "laying in the front yard with mail thrown about the yard as well[.]" (*Id.*) Officer Karr knocked on the front door, and Zachary Williams answered the door. Williams lived in the house and rented it from his stepfather.

[3] After speaking with Williams, Officer Karr walked around the house to look for the suspicious person and found Barton. Barton was shirtless and wearing shorts. He also had a brick in his hand. Barton then threw the brick through the house's rear kitchen window. Officer Karr drew his department-issued firearm and ordered Barton to show his hands. Instead of complying with Officer Karr's command, Barton turned and started to run around a corner of the house. Officer Karr caught up to Barton and holstered his firearm after he saw Barton sitting on the ground without anything in his hands. Officer Karr ordered Barton to roll over on his stomach. Barton complied with that instruction, but he refused Officer Karr's orders to put his hands behind his back. Barton started to stand back up, but Officer Karr threatened to deploy his taser. Barton eventually placed his hands behind his back and Officer Karr handcuffed him. As Officer Karr was handcuffing him, Barton stated: "I am a good dude man. . . . Please don't man. Oh my God man. I think my family is in that building." (*Id.* at 25.) Barton also said that he heard screaming from the house and "there is something going on." (*Id.* at 26.)

[4] After arresting Barton and leaving him with other responding officers, Officer Karr went around the house to observe the broken window. He also went inside the house and determined that the brick "struck the stove, shattering the oven door." (*Id*. at 13.) Officer Karr read Barton his *Miranda*[3] rights and Barton agreed to speak with Officer Karr without an attorney present.

> OFFICER [K[4]]ARR: What's happening? Why did you throw the brick through the window?
>
> MR BARTON: I haven't seen my daughter in three years man[.]
>
> OFFICER [K]ARR: Why did you throw the brick through the window[?]
>
> MR BARTON: Because I heard my (inaudible) like they were in an electric chair. You know my daughter sounded like she was in an electric chair.
>
> OFFICER [K]ARR: You thought they were in the house[.]
>
> MR BARTON: Yeah[.]

(*Id*. at 34.)

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966), *reh'g denied*.

[4] The transcript spells the officer's surname as "Carr" throughout. (*See* Tr. Vol. 2.) However, we spell his name "Karr" because that is how the officer spelled his name in the probable cause affidavit and the arrest report narrative. (*See* App. Vol. 2 at 18-19.)

[5] On July 27, 2021, the State charged Barton with Class A misdemeanor resisting law enforcement and Class B misdemeanor criminal mischief. The trial court held a bench trial on September 22, 2023. After the State rested, Barton moved for a directed verdict on the count charging Barton with criminal mischief. Barton argued that "[t]he State didn't provide any evidence of the owner of the home, their names, who owned it, whether or not they consented to any of this happening[.]" (*Id*. at 53-54.) The trial court denied Barton's motion, and after the parties gave closing arguments, the trial court entered a verdict finding Barton guilty as charged.

[6] The trial court then proceeded to sentence Barton. The State recommended the trial court impose a fully executed sentence. After hearing the State's recommendation, the trial court then asked Barton for his recommendation, and Barton recommended the trial court impose a six-month sentence and asked the trial court to fully suspend the sentence to probation. The trial court then stated: "Alright I am going to sentence Mr. Barton to one year on resisting law enforcement fully executed, 180 days on the criminal mischief executed but I am going to run them concurrent." (*Id*. at 59.) The trial court explained:

> Mr. Barton has a long history of criminal activity as well as additional criminal activity while he was this case was pending. In addition the Court feels that the destruction of an individual property and the intrusion and the amount of damage into a private persons home is the reason for the fully executed sentence.

(*Id*.) (errors in original). On September 25, 2023, the trial court entered a written sentencing order that stated: "The court imposes the following sentence: Count 1-Execute 360 days and Count 2-Execute 180 days all to run CONCURRENT to each count but CONSECUTIVE to any other cases." (App. Vol. 2 at 14) (emphases in original).

Discussion and Decision

1. Directed Verdict

[7] Barton first asserts the trial court erred when it denied his motion for a directed verdict on the count alleging criminal mischief. "The standard of review following denial of a motion for a directed verdict is essentially the same as that upon a challenge to the sufficiency of the evidence." *Russell v. State*, 217 N.E.3d 544, 549 (Ind. Ct. App. 2023), *trans. denied*. If the evidence is sufficient to sustain a defendant's conviction on appeal, then the denial of a motion for a directed verdict is not an error. *Id*. Our standard of review regarding claims of insufficient evidence is well settled:

> Sufficiency-of-the-evidence claims . . . warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility. Rather, we consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. 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.

Powell v. State, 151 N.E.3d 256, 262-63 (Ind. 2020) (internal citations omitted).

[8] Indiana Code section 35-43-1-2 provides: "A person who recklessly, knowingly, or intentionally damages or defaces property of another person without the other person's consent commits criminal mischief, a Class B misdemeanor." Barton notes the charging information alleged he "did recklessly, knowingly, or intentionally damage or deface the property of Zachary T. Williams, to-wit: a window and stove, without the consent of Zachary T. Williams." (App. Vol. 2 at 15.) Barton contends that "[t]he elements of the offense he was charged with do not allow the state to simply prove any other person owned the property; the facts claimed in the charging instrument require that the state specifically prove Zachary Williams owned the property." (Appellant's Br. at 13.)

[9] We disagree. Even though Williams was a tenant rather than an owner, the house was still his "property" because he had a possessory interest in it. *See* Ind. Code § 35-31.5-2-253(b) ("Property is that 'of another person' if the other person has a possessory or proprietary interest in it, even if an accused person also has an interest in that property."). Moreover, "[t]he purpose of the charging information is to provide a defendant with notice of the crime of which he is charged so that he is able to prepare a defense." *State v. Laker*, 939 N.E.2d 1111, 1113 (Ind. Ct. App. 2010), *trans. denied*. It is undisputed that the property the State alleged was damaged was the house on Akers Avenue that Williams lived in on July 24, 2021. The State's inclusion of Williams's name in the charging information did not change what elements the State was required to prove at trial. The State was only required to prove the damaged or defaced property did not belong to Barton and Barton did not have permission to

damage it. *See* Ind. Code § 35-43-1-2. Williams's name was mere surplusage because it could have been omitted from the charging information. *See Parahams v. State*, 908 N.E.2d 689, 693 (Ind. Ct. App. 2009) ("It is well established that 'facts which may be omitted from an information without affecting the sufficiency of the charge against the defendant are mere surplusage and do not need to be proved.'") (quoting *Bonner v. State*, 789 N.E.2d 491, 493 (Ind. Ct. App. 2003)).

[10] Officer Karr testified that he responded to a call regarding a suspicious person and saw Barton throw a brick through the back window of the Akers Avenue house. Barton never claimed ownership of the house, and Officer Karr's testimony and the bodycam footage established that the property did not belong to Barton. Even though Barton stated he thought his family was inside the house, he never asserted that he had permission to break the window and the oven door. Moreover, Barton's flight from Officer Karr is further evidence that he knew he was not supposed to damage the house. Therefore, the trial court did not err in denying Barton's motion for a directed verdict. *See*, *e.g.*, *Milo v. State*, 137 N.E.3d 995, 1004 (Ind. Ct. App. 2019) (holding trial court did not err in denying defendant's motion for a directed verdict when charging information was sufficient and evidence produced at trial supported burglary conviction), *trans. denied*.

2. Due Process at Sentencing

[11] Second, Barton argues Indiana Code section 35-38-1-2(b) required the trial court to give him the opportunity to request adjournment before pronouncing sentence and the trial court failed to comply with that requirement. Because we are asked to determine whether the trial court's inquiry was adequate as a matter of law, our standard of review is de novo. *Church v. State*, 189 N.E.3d 580, 585 (Ind. 2022) ("when a trial court's ruling involves a pure question of law, such as the interpretation or constitutionality of a statute, our standard of review is de novo").

[12] Indiana Code section 35-38-1-2(b) states:

> (b) Upon entering a conviction, the court shall set a date for sentencing within thirty (30) days, unless for good cause shown an extension is granted. If a presentence report is not required, the court may sentence the defendant at the time the judgment of conviction is entered. However, the court may not pronounce sentence at that time without:
>
> > (1) inquiring as to whether an adjournment is desired by the defendant; and
> >
> > (2) informing the victim, if present, of a victim's right to make a statement concerning the crime and the sentence.
>
> When an adjournment is requested, the defendant shall state its purpose and the court may allow a reasonable time for adjournment.

Here, a presentence report was not required because Barton was convicted of two misdemeanor offenses. *See* Ind. Code § 35-38-1-8(a) (requiring written presentence report be prepared by probation officer before trial court sentences defendant following a felony conviction). The trial court immediately proceeded to sentencing after entering its verdict and asked for the State's recommended sentence. After the State recommended a fully executed sentence, the trial court stated: "Alright. [Defense Counsel] is the defense prepared to make a recommendation." (Tr. Vol. 2 at 58.) Barton then requested that the trial court place him on probation during a six-month sentence.

[13] On appeal, Barton asserts he "was denied the opportunity to adjourn and prepare for sentencing, which would have allowed him time to obtain and produce evidence documenting his mental health issues." (Appellant's Br. at 15.) Barton acknowledges "the relevant case law on this issue is scant," but he contends his case is analogous to a situation "where the trial court has failed to inquire as to whether the defendant wished to make a statement at sentencing[.]" (*Id*. at 14); *see*, *e.g.*, *Fields v. State*, 676 N.E.2d 27, 31 (Ind. Ct. App. 1997) (remanding for new sentencing hearing when the trial court did not advise Fields of his right to speak on his own behalf at sentencing or ask if he wished to make a statement before pronouncement of sentence), *trans. denied*. However, Barton's analogy is flawed because when the trial court asked him if he was prepared to proceed with sentencing, he could have stated that he was unprepared to make a recommendation or he could have asked for additional

time to prepare. Unlike in *Fields* where the trial court simply did not afford the defendant the opportunity to speak on his own behalf, *id.*, the trial court gave Barton the opportunity to ask for additional time before sentencing him, but Barton chose not to request it. Therefore, we hold the trial court adequately afforded Barton the opportunity to request adjournment before it pronounced sentence. *See*, *e.g.*, *Murphy v. State*, 447 N.E.2d 1148, 1150 (Ind. Ct. App. 1983) (defendant waived right to be sentenced within thirty days of judgment because he did not object when the trial court set his sentencing date outside the thirty-day period).

3. Appropriateness of Sentence

[14] In the pronunciation of the sentence, the trial court stated it was imposing a one-year sentence with respect to Barton's conviction of Class A misdemeanor resisting law enforcement. However, the trial court's written sentencing order listed Barton's sentence for that crime as 360 days. We therefore remand with instructions for the trial court to issue an order resolving the discrepancy between the sentence pronounced at Barton's sentencing hearing and the written sentencing order. *See*, *e.g.*, *Walker v. State*, 932 N.E.2d 733, 738 (Ind. Ct. App. 2010) (remanding case to resolve discrepancy between oral and written sentencing statements), *reh'g denied*.

[15] Nonetheless, both Barton and the State assume the trial court intended to sentence Barton to a term of 365 days, and Barton contends such a sentence is

inappropriate given the nature of his offenses and his character. Our standard of review regarding such claims is well settled:

> Indiana Appellate Rule 7(B) gives us the authority to revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Our review is deferential to the trial court's decision, and our goal is to determine whether the appellant's sentence is inappropriate, not whether some other sentence would be more appropriate.

George v. State, 141 N.E.3d 68, 73 (Ind. Ct. App. 2020) (internal citations omitted), *trans. denied*. We may look at any factors appearing in the record when assessing the nature of the offense and character of the offender. *Boling v. State*, 982 N.E.2d 1055, 1060 (Ind. Ct. App. 2013). The defendant bears the burden of persuading us that his sentence is inappropriate. *Hubbert v. State*, 163 N.E.3d 958, 960 (Ind. Ct. App. 2021), *trans. denied*.

[16] Indiana Code section 35-50-3-2 provides: "A person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year[.]" Indiana Code section 35-50-3-3 states: "A person who commits a Class B misdemeanor shall be imprisoned for a fixed term of not more than one hundred eighty (180) days[.]" Thus, the trial court imposed the maximum sentence for each of Barton's crimes, although the trial court ordered Barton to serve his sentences concurrently.

[17] Barton asserts his offenses are "minor on the spectrum of resisting law enforcement and criminal mischief." (Appellant's Br. at 19.) With respect to his resisting law enforcement conviction, Barton notes that he sat down soon

after Officer Karr began pursuing him, but he only did so after Officer Karr repeatedly told him to stop. In addition, after Officer Karr caught up to him, Barton refused to give Officer Karr his hands so that Officer Karr could handcuff him. Officer Karr needed to threaten Barton with a taser before Barton finally cooperated.

[18] With respect to his criminal mischief conviction, Barton asserts his comments at the scene that he thought his daughter was being tortured inside the house demonstrate "he was certainly not acting maliciously." (Appellant's Br. at 20.) However, Barton ran immediately after throwing a brick through the window, which indicates a consciousness of guilt. *See Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001) ("Flight and related conduct may be considered by a jury in determining a defendant's guilt."). Barton also asserts the property damage from his acts was minimal, but we cannot say his offense was "accompanied by restraint, regard, and lack of brutality[.]" *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[19] Barton shattered a window and an oven door without any provocation, necessitating that an innocent person incur the inconvenience and expense associated with repairing those items. In addition, Barton's act of throwing a brick through the window could have caused injury if someone had been in the kitchen. Thus, we cannot say Barton's sentence is inappropriate given the nature of his offenses. *See*, *e.g.*, *Anderson v. State*, 989 N.E.2d 823, 827 (Ind. Ct. App. 2013) (holding defendant's sentence for criminal mischief was not

inappropriate given the nature of her offense after she damaged rental property), *trans. denied*.

[20] Moving on to Barton's character, Barton acknowledges that his record "is riddled with misdemeanors and low-level felonies," but he asserts his mental health issues render his sentence inappropriate. (Appellant's Br. at 18.) However, Barton presented no evidence that he had been diagnosed by a medical professional with any mental illness or that his offenses were the result of mental illness. On the bodycam video, Officer Karr speculated that Barton was under the influence of narcotics at the time of the instant offenses. Moreover, even a minor criminal history reflects poorly on a defendant's character. *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020). Barton's sentence is not inappropriate given his character, and we hold the trial court's imposition of an aggregate one-year fully executed sentence was not inappropriate.[5] *See*, *e.g.*, *id.* at 1175 (holding defendant's sentence was not inappropriate given her criminal history).

Conclusion

[21] The trial court did not err in denying Barton's motion for a directed verdict because the State presented sufficient evidence that he committed criminal mischief. In addition, the State gave Barton an adequate opportunity to request

[5] As a 365-day sentence is not inappropriate, a 360-day sentence also would not be inappropriate, if that is the sentence that the trial court intended to impose.

adjournment before pronouncing sentence. Barton's sentence is not inappropriate given the nature of his offenses and his character, but we remand his case for the trial court to resolve a discrepancy between its oral pronouncement of sentence and its written sentencing order. We affirm the trial court and remand.

[22] Affirmed and remanded.

Vaidik, J., and Kenworthy, J., concur.

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