

Appellant/Defendant Jennings Daugherty appeals following his convictions for Class D felony Intimidation,¹ Class D felony Operating a Motor Vehicle While Intoxicated,² two counts of Class B felony Possession of a Firearm by a Serious Violent Felon,³ and the subsequent finding that he is a Habitual Offender,⁴ for which he received an aggregate fifty-three-year sentence. Upon appeal, Daugherty claims that: (1) the trial court's denial of his motion to suppress constituted an abuse of the court's discretion; (2) his multiple convictions for possession of a firearm by a serious violent felon violate the prohibitions against double jeopardy; (3) the trial court erred in allowing the State to amend the habitual offender information; and (4) his sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY⁵

At 2:48 a.m. on May 26, 2007, Captain Thomas Porfidio of the Richmond Police Department was dispatched to Bertie's Bar in Richmond upon receiving a complaint of a bar fight. Upon arriving, Captain Porfidio spoke with the bartender who indicated that Daugherty had shoved her. The bartender further indicated that Daugherty was sitting in a van that was parked across the street from the bar, and requested that Daugherty be banned

¹ Ind. Code § 35-45-2-1(a)(2); (b)(1)(B)(i) (2006).

² Ind. Code §§ 9-30-5-2, -3 (2006).

³ Ind. Code § 35-47-4-5(c) (2006).

⁴ Ind. Code § 35-50-2-8 (2006).

⁵ We note that the trial court incorporated the evidence presented during a December 3, 2009 hearing on Daugherty's motion to suppress into the evidence presented during Daugherty's April 19, 2010 bench trial. Accordingly, we will consider the evidence presented during the December 3, 2009 hearing as if it were actually presented during trial.

from returning to the bar. The bartender indicated, however, that she did not wish to press charges against Daugherty.

After speaking to the bartender, Captain Porfidio approached the van in which Daugherty was sitting in the front passenger seat. Captain Porfidio observed four individuals, including Daugherty, in the van. By this time, Officer Kevin Smith, who had also responded to the scene, was speaking to Daugherty. During the course of his conversation with Daugherty, Officer Smith asked Daugherty to step out of the van. Captain Porfidio and Officer Smith observed as Daugherty stumbled and nearly fell while attempting to get out of the van. Daugherty also exhibited multiple signs of intoxication, including the strong odor of alcohol; red, bloodshot, and watery eyes; thick-tongued, slow speech; and slow, fumbling manual dexterity. Both Captain Porfidio and Officer Smith determined based on their training as police officers that Daugherty was intoxicated and, thus, incapable of driving. The officers instructed one of the other individuals in the van to drive Daugherty home where he could “sleep it off.” Tr. pp. 7, 61.

Forty-seven minutes later, at 3:35 a.m., Captain Porfidio was patrolling another area of Richmond when he saw the van in which Daugherty was earlier sitting. Captain Porfidio pulled alongside the van at a traffic light and observed that Daugherty was driving the vehicle. Captain Porfidio activated his emergency lights and initiated a traffic stop. Initially, Daugherty pulled over to the curb, but started to slowly drive away as Captain Porfidio opened the door of his marked police cruiser. Captain Porfidio closed his door and followed Daugherty until he again pulled over to the curb. Daugherty attempted to slowly drive away

a second time as Captain Porfidio opened his cruiser door. Daugherty pulled into a parking lot where he again stopped, only to slowly drive away as Captain Porfidio again attempted to approach his vehicle. Daugherty stopped the van when he could no longer drive forward without driving into a building.

Officers Smith and Ami Miller arrived as Captain Porfidio approached the driver's side of the van and asked to see Daugherty's identification. In attempting to comply with Captain Porfidio's request, Daugherty fumbled with his wallet and dropped it into his lap. Captain Porfidio shined his flashlight on the wallet and observed the "butt-end" of a pistol sticking up from between Daugherty's legs. Tr. pp. 12, 83. Captain Porfidio called out, "gun," stepped back, and drew his service weapon. Tr. p. 14. At the same time, Officer Miller drew her taser, stepped toward the vehicle, and tased Daugherty.

Captain Porfidio pulled Daugherty out of the vehicle while the taser was still cycling, and the pistol that was in Daugherty's lap fell to the ground and was recovered by police. Police also recovered a rifle that was found on the front floorboard of Daugherty's vehicle. The rifle was within reach of the driver's seat where Daugherty had been sitting. Both weapons were loaded. Daugherty was taken to a local hospital where he was hostile to the officers. Daugherty spit at the officers, threatened to kill them and their families, and threatened to rape their wives. The officers later testified that Daugherty's threats put them in fear for both their personal safety and their families' safety.

Later that day, Daugherty was charged with Class A misdemeanor carrying a handgun without a license, Class D felony intimidation, Class D felony operating a motor vehicle

while intoxicated, Class D felony resisting law enforcement, and two counts of Class B felony possession of a firearm by a serious violent felon. The State further alleged that the Class A misdemeanor carrying a handgun charge should be enhanced to a Class C felony because Daugherty had a prior felony conviction. Daugherty was also alleged to be a habitual offender. On August 14, 2009, Daugherty filed a motion to suppress the evidence recovered following what he alleged was an illegal traffic stop by Captain Porfidio. The trial court denied Daugherty's motion to suppress on February 16, 2010, and subsequently denied his request that the ruling be certified for interlocutory appeal.

During an April 9, 2010 pre-trial hearing, Daugherty waived his right to a jury trial and indicated that he would stipulate to being a habitual offender if convicted of the underlying crimes. Daugherty filed a second motion to suppress on April 13, 2010. Daugherty failed to appear on the morning of his April 19, 2010 bench trial, and the trial was conducted, over his counsel's objection, without Daugherty present. The State dismissed the resisting law enforcement charge. Upon reviewing the evidence presented by the parties, the trial court denied Daugherty's second motion to suppress and found Daugherty guilty of the remaining counts as charged.

On July 20, 2010, the State requested permission to amend its habitual offender allegation by replacing two of Daugherty's alleged felony convictions with different felony convictions because the State subsequently learned that the two alleged felony convictions had previously been reversed by the Indiana Supreme Court. Following a hearing, the trial court granted the State's request and allowed the amendment. Daugherty subsequently

admitted to being a habitual offender.

At sentencing, the State moved to set aside the Class C felony carrying a handgun without a license conviction out of double jeopardy concerns. The trial court imposed a three-year sentence for the intimidation conviction that was to run concurrently to a one-and-one-half-year sentence for the operating while intoxicated conviction, but consecutively to the two consecutive fifteen-year sentences for each of the possession of a firearm by a serious violent felon convictions. The trial court enhanced Daugherty's sentence by an additional twenty years as a result of his status as a habitual offender, for an aggregate fifty-three-year sentence. This appeal follows.

DISCUSSION AND DECISION

I. Whether the Trial Court Erred in Denying Daugherty's Motion to Suppress

Daugherty first challenges the trial court's denial of his motion to suppress certain evidence at trial. Specifically, Daugherty argues that the trial court erred in denying his motion to suppress because Captain Porfidio lacked reasonable suspicion to initiate the traffic stop.

We review the denial of a motion to suppress in a manner similar to other sufficiency matters. We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. However, unlike the typical sufficiency of the evidence case where only the evidence favorable to the judgment is considered, we must also consider the uncontested evidence favorable to the defendant.

Bentley v. State, 779 N.E.2d 70, 73 (Ind. Ct. App. 2002) (citations omitted). "Although we generally review a trial court's decision to admit evidence despite a motion to suppress under

an abuse-of-discretion standard, the ultimate determination of whether an officer had reasonable suspicion to conduct an investigatory stop is reviewed *de novo*.” *Crabtree v. State*, 762 N.E.2d 241, 244 (Ind. Ct. App. 2002).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. *Burkes v. State*, 842 N.E.2d 426, 429 (Ind. Ct. App. 2006), *trans. denied*.

The Fourth Amendment regulates nonconsensual encounters between citizens and law enforcement officials and does not deal with situations in which a person voluntarily interacts with a police officer. A full-blown arrest or a detention that lasts for more than a short period of time must be justified by probable cause. A brief investigative stop may be justified by reasonable suspicion that the person detained is involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 31, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Finger v. State, 799 N.E.2d 528, 532 (Ind. 2003) Thus, “[b]ecause a traffic stop is a seizure under the Fourth Amendment, police may not initiate a stop for any conceivable reason, but must possess at least reasonable suspicion that a traffic law has been violated or that other criminal activity is taking place.” *Meredith v. State*, 906 N.E.2d 867, 869 (Ind. 2009).

Reasonable suspicion exists where the facts known to the officer at the moment of the stop, together with the reasonable inferences arising therefrom, would cause an ordinarily prudent person to believe that criminal activity has occurred or is about to occur. *Burkes*, 842 N.E.2d at 429-30. In deciding whether there was reasonable suspicion for a stop, we look to the totality of the circumstances of a given case. *Id.* at 430. “An officer’s decision to stop a vehicle is valid so long as his on-the-spot evaluation reasonably suggests that lawbreaking occurred.” *Meredith*, 906 N.E.2d at 870.

In the instant matter, the record demonstrates that at the time of the stop, Captain Porfidio had encountered Daugherty approximately forty-seven minutes earlier, at which time Daugherty had nearly fallen out of the front passenger seat of the very vehicle he was now driving and exhibited numerous signs of intoxication including the strong odor of alcohol; red, bloodshot, and watery eyes; thick-tongued, slow speech; and slow, fumbling manual dexterity. Captain Porfidio testified that in light of his training and experience as a police officer, he believed that Daugherty was intoxicated during their first encounter, and was likely still intoxicated less than an hour later when he observed him driving the van. We conclude that the totality of these circumstances indicates that Captain Porfidio reasonably determined that Daugherty was likely breaking the law by operating a vehicle while intoxicated, and as a result, had reasonable suspicion to stop Daugherty's vehicle.⁶

II. Whether Daugherty's Convictions for Possession of a Firearm by a Serious Violent Felon Violate the Prohibitions Against Double Jeopardy

Daugherty contends that his multiple convictions for possession of a firearm by a serious violent felon violate Indiana's prohibitions against double jeopardy. The double jeopardy clause of the Indiana Constitution provides, "No person shall be put in jeopardy twice for the same offense." Ind. Const. art. 1, § 14. Whether Daugherty's convictions violate the prohibition against double jeopardy presents an issue of statutory interpretation,

⁶ Daugherty argues that Captain Porfidio lacked reasonable suspicion to believe that Daugherty may be driving while intoxicated because Daugherty had not been arrested for public intoxication during his earlier encounter with Captain Porfidio. At the time of their prior encounter, Daugherty was sitting in the passenger seat of the van he was later stopped while driving. However, the fact that Captain Porfidio arguably gave Daugherty a gift by instructing others to drive him home rather than arresting him for public intoxication does not affect Captain Porfidio's ability to determine that Daugherty was likely still intoxicated and, thus, breaking the law by operating a vehicle a mere forty-seven minutes later.

which is an issue of law we review *de novo*. *Taylor v. State*, 929 N.E.2d 912, 920 (Ind. Ct. App. 2010) (citing *Brown v. State*, 912 N.E.2d 881, 893 (Ind. Ct. App. 2009)), *trans. denied*. The classic test for multiplicity is whether the legislature intended to punish individual acts separately or the course of action which they make up. *Id.*

This court was recently faced with the question as to whether multiple convictions for possession of a firearm by a serious violent felon violate the Indiana prohibitions against double jeopardy. *See id.* at 920-922. In *Taylor*, we concluded that based on the plain and ordinary language of Indiana Code section 35-47-4-5(c), the “legislature’s intent was to make each unlawful possession of one firearm by a serious violent felon a separate and independent crime.” *Id.* at 921 (citing *Brown*, 912 N.E.2d at 894, 896 (holding that the legislature’s listing in child exploitation and possession of child pornography statutes of objects in the singular indicates legislative intent to criminalize each instance of child exploitation and each possession of child pornography as a distinct violation of statutes)).

Like the defendant in *Taylor*, Daugherty relies upon *Campbell v. State*, 734 N.E.2d 248 (Ind. Ct. App. 2000), in support of his claim that his multiple convictions of possession of a firearm by a serious violent felon violate the prohibitions against double jeopardy. In *Campbell*, this court concluded that a defendant who simultaneously possessed multiple packages of cocaine in different places can be convicted of only one possession offense because “the effect of the accumulated quantity possessed is to aggravate the possession rather than to break it into multiple possessions.” 734 N.E.2d at 251. However, as we discussed in *Taylor*,

the statute governing possession of cocaine is different from the statute governing unlawful possession of a firearm by a serious violent felon in two important ways. First, while the statute governing possession of cocaine does not identify individual acts of possessing cocaine, the statute at issue here criminalizes the act of possessing one distinct firearm. Here, in accordance with statute, the State's charging information alleged [multiple] separate counts, with one count corresponding to each weapon found.

Second, the statute at issue here provides no aggravation of the offense in the event a defendant possesses more than one firearm.... As noted by Judge Shields, [Indiana Code section 35-48-4-6 indicates that] a greater amount of cocaine possessed serves to aggravate the crime rather than to break it into multiple possessions.

Taylor, 929 N.E.2d at 922. Thus, this court “declin[e] to find double jeopardy based on multiple convictions for possession of cocaine sufficiently analogous to Taylor’s issue.” *Id.*

Here, Captain Porfidio initiated a traffic stop after he saw Daugherty, a serious violent felon, driving a vehicle when he had reasonable suspicion to believe that Daugherty may be intoxicated. Upon approaching Daugherty’s vehicle, Captain Porfidio observed the “butt-end” of a pistol sticking up from between Daugherty’s legs. Tr. pp. 12, 83. Police also recovered a rifle that was found on the front floorboard of Daugherty’s vehicle. The rifle was within reach of the driver’s seat where Daugherty had been sitting. Both weapons were loaded. Daugherty was subsequently convicted of two counts of possessing a firearm. As in *Taylor*, we likewise decline to find that a double jeopardy violation based on multiple convictions for possession of cocaine is sufficiently analogous to the instant matter. Further, to the extent that Daugherty attempts to distinguish *Taylor* from the instant matter by arguing that his possession of multiple weapons constituted a single act of criminal conduct, we find Daugherty’s argument to be unpersuasive. Accordingly, we conclude that Daugherty’s

multiple convictions for possession of a firearm by a serious violent felon do not violate Indiana's prohibition against double jeopardy. *See Taylor*, 929 N.E.2d at 922.

III. Whether the Trial Court Erred in Allowing the State to Amend the Habitual Offender Information

Daugherty also contends that the trial court erred by allowing the State to amend the habitual offender information prior to the commencement of the habitual offender phase of trial. In *Haymaker v. State*, 677 N.E.2d 1113 (Ind. 1996), the Indiana Supreme Court held that Indiana Code section 35-34-1-5(c) allows the State to amend a previously filed habitual offender information "at any time, as long as the amendment 'does not prejudice the substantial rights of the defendant.'" 667 N.E.2d at 1114.

The State filed an information alleging that Daugherty was a habitual offender on May 26, 2007. During an April 9, 2010 pre-trial conference, Daugherty's counsel informed the trial court that Daugherty would admit to being a habitual offender if he were convicted of the underlying charges. Daugherty was subsequently convicted of Class C felony carrying a handgun without a license, Class D felony intimidation, Class D felony operating a vehicle while intoxicated, and two counts of Class B felony possession of a firearm by a serious violent felon. The trial court ordered the Wayne County Probation Department to complete a Presentence Investigation Report ("PSI") prior to sentencing and the habitual offender phase of the trial.

Upon reviewing the completed PSI, both parties became aware that two of the four felonies listed in the habitual offender information had been previously overturned by the

Indiana Supreme Court. In light of this information, the State sought permission to amend the habitual offender allegation to include two of Daugherty's other prior unrelated felony convictions. On August 6, 2010, the trial court granted the State's request to amend the habitual offender information over Daugherty's objection. Daugherty subsequently admitted to being a habitual offender. Given Daugherty's stated intention to admit to the habitual offender allegation, we conclude that he has failed to provide us with any evidence on appeal which demonstrates that he was prejudiced by the timing of this amendment. Thus, we find no error. *See id.*

Moreover, even if Daugherty could establish prejudice, he has waived this issue for appeal. "Once defendant's objection had been overruled, he should have requested a continuance, as required by *Daniel v. State*, 526 N.E.2d 1157 (Ind.1988)." *Id.* Here, nothing in the record indicates that Daugherty requested a continuance after his objection to the State's request to amend the habitual offender information was overruled. Therefore, since Daugherty had the opportunity to request a continuance and chose not to, he has waived this issue for appeal. *Id.*

IV. Whether Daugherty's Sentence is Appropriate

Daugherty last claims that his thirty-three-year sentence, which was enhanced twenty years by virtue of his status as a habitual offender, is inappropriate.⁷ Indiana Appellate Rule

⁷ On appeal, Daugherty frames this issue as whether the trial court abused its discretion by imposing both enhanced and consecutive sentences against appellant. However, Daugherty's claim on appeal includes only the argument that his sentence is inappropriate in light of the nature of his offenses and his character. We will therefore review Daugherty's claim under the appropriateness standard set forth in Indiana Appellate Rule 7(B).

7(B) provides that we “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.” The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

With respect to the nature of Daugherty’s offenses, the record indicates that on the night in question, Daugherty first encountered police after he became engaged in an altercation at Bertie’s Bar. At that time, Captain Porfidio and Officer Smith observed that Daugherty was under the influence of drugs or alcohol. Forty-seven minutes later, Captain Porfidio observed Daugherty operating a motor vehicle and initiated a traffic stop. On three separate occasions, Daugherty pulled over or stopped his vehicle, only to slowly drive away as Captain Porfidio opened the door of his marked police cruiser. Eventually, Captain Porfidio was able to approach Daugherty’s vehicle and observed the butt of a handgun between Daugherty’s legs. The handgun, as well as a rifle that was on the floor of the vehicle within Daugherty’s reach, were later determined to be loaded. Daugherty was taken to the hospital where he was hostile to the officers. Daugherty spit at the officers, threatened to kill them and their families, and threatened to rape their wives. Considering that Daugherty was armed with two loaded firearms at the time of his arrest, the officers deemed Daugherty’s threats credible, and were in fear for both their safety and that of their families.

With respect to Daugherty’s character, our review reveals that Daugherty, who chose not to appear for his bench trial, has amassed a substantial criminal record that includes

numerous misdemeanor and felony convictions. Daugherty's previous misdemeanor convictions include convictions for visiting a common nuisance, driving without insurance, public intoxication, disorderly conduct, and multiple convictions for operating a motor vehicle while intoxicated. His previous felony convictions include possession of marijuana, dealing in a schedule IV Controlled Substance, and maintaining a public nuisance. In addition, at the time of sentencing, three additional felony charges were pending against Daugherty, including charges for Class A felony dealing in cocaine, Class B felony possession of cocaine, and Class D felony maintaining a common nuisance. Moreover, Daugherty has previously been placed on probation but has failed to modify or reform his behavior to conform to the laws of this state. While many of Daugherty's prior convictions stem from drug or alcohol use, we observe that Daugherty was under the influence of drugs or alcohol at the time of the instant offenses where he threatened to kill both the officers and their families immediately after he had been arrested while armed with two loaded firearms. Moreover, Daugherty was born in 1964, and suffered his first felony conviction in 1985. Since that time he has continued a steady stream of criminal conduct which is an indicator that he will only continue to commit felonies and misdemeanors in the future. Based on our review of the evidence, we cannot say that his sentence is inappropriate.

The judgment of the trial court is affirmed.

BAKER, J., and MAY, J., concur.