ATTORNEY FOR APPELLANT

David T.A. Mattingly
Mattingly Law, LLC
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Samuel J. Dayton
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Rhett A. Martin,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 30, 2021

Court of Appeals Case No. 20A-CR-2326

Appeal from the Benton Circuit Court

The Honorable Rex W. Kepner, Judge

Trial Court Cause No. 04C01-1912-MR-284

Brown, Judge.

[1] Rhett A. Martin appeals his convictions for murder, two counts of felony murder, and arson, and his sentence for murder and arson. Martin raises four issues which we revise and restate as:

I. Whether he was denied his constitutional right to present a defense when his accomplice, Duane Scott Muse, did not invoke his right against self-incrimination in front of the jury;

II. Whether his convictions for felony murder should be vacated;

III. Whether the evidence is sufficient to sustain his convictions for murder and arson; and

IV. Whether his aggregate sentence is inappropriate in light of the nature of the offenses and his character.

We affirm in part, reverse in part, and remand.[1]

Facts and Procedural History

[2] Sonya Riegle ("Sonya") dated Nick Riegle ("Nick") for about five years and married him. In approximately 2017, Nick's father, Dan Riegle ("Riegle"), moved in with Nick, Sonya, and her two daughters. In August 2017, Sonya found a camera in the bathroom that she and her daughters used. When she confronted Riegle, he admitted that the camera was his and he was sick. Sonya

[1] On November 30, 2021, we held oral argument at Pike Central High School in Petersburg, Indiana. We thank counsel for traveling to Petersburg and for their well-prepared advocacy. We thank the faculty, staff, and students of Pike Central High School for their gracious hospitality, and we thank the students for their attention during the argument.

and Nick kicked out Riegle, and Nick placed Riegle's camera and computer in the garage.

[3] Sonya met Martin, began a romantic relationship with him, and told him about the camera. At some point, Martin moved in with Sonya, and Nick moved out of the house. Sonya decided she was going to take Riegle's camera and computer to the police, but the equipment was no longer in the garage. Martin told Sonya that he thought Nick and Riegle had returned and removed the camera and equipment.

[4] On December 26, 2018, Sonya kicked Martin out of her house, and Nick eventually moved back in with her. Martin began communicating threats to Sonya regarding Nick and said that he "would take care of" Nick. Transcript Volume 3 at 190. He also sent Sonya pictures of a gun and Nick's truck. Martin admitted that he had Riegle's camera or computer equipment and had seen the pictures of Sonya and her daughters. He communicated with Sonya thousands of times, stated that he was "figuring things out," and "said something to the effect that he would make [Riegle] pay." *Id.* at 198.

[5] Martin usually texted Sonya "24-7," but the messages became "less and less" in the nights leading up to December 6, 2019. *Id.* at 200. At some point, Martin told Sonya that he would make her "as miserable as he was and that he would make sure that [she] was not ever going to be married to Nick." *Id.* at 210. Nick observed Martin sitting outside of his house waiting for him and Sonya to exit, and began trying to avoid Martin by parking in random places.

[6] In December 2019, Martin had lived with Duane Scott Muse for nearly a year. On December 6, 2019, Brad Lane of the Fowler Center Township Fire Department responded to a fire at Riegle's residence, found Riegle's body in the living room, and pulled the body out of the house. When firefighters rolled the body, they discovered a burnt metal can underneath. State Fire Marshall's Investigator Joe Tanasovitch collected the acetone can from the scene and determined that the fire started in the living room by someone lighting acetone. Based on the level of burn and charring on Riegle's body, Investigator Tanasovitch believed that Riegle had acetone poured on him. Dr. Darren Wolf, a forensic pathologist, conducted an autopsy, recovered a bullet fragment from Riegle's body, determined Riegle suffered a single gunshot wound to the neck and was not breathing during the fire, and concluded that the cause of death was the gunshot wound.

[7] On December 6, 2019, Indiana State Police Detective Brock Russell advised Martin of his rights and interviewed him. Martin admitted to making the statement that he would kill Nick. When asked whether he had any guns, Martin said no, he had "got rid of his," and had previously owned a "glock 17 gen 5." *Id.* at 143. When asked where he had been the previous night, Martin indicated that he had been home all night and that his cousin, Muse, could verify that. During the interview, Detective Russell did not say anything about the caliber of the bullet used to kill Riegle or release any information during the early stages of the investigation regarding the caliber of the weapon used.

[8] On December 8th or 9th, Martin contacted Chad Ray and attempted to sell him lighting, a plasma cutter, and a Benelli shotgun. He also told Ray about a box truck that he could have for $200. Martin said that he had been questioned in a murder, the shotgun had not been used in the murder, and the police had told him a smaller caliber weapon was used in that homicide.

[9] On December 11, 2019, law enforcement conducted a search of Martin's trash and discovered two keys which had been ground down, one of which appeared to be a vehicle key, numerous pairs of latex gloves, pants, strips of cloth, a cloth glove with the fingers cut off, a piece of white tissue paper with what appeared to be blood stains, and mail addressed to Martin and Muse. Ray, who was at Martin's house at the time the trash can was removed, observed that Martin "was pretty freaked out about that." Transcript Volume 4 at 19.

[10] That same day, law enforcement searched the residence of Martin and Muse and discovered loose cartridges of different sized ammunition, speed loaders for a revolver, ammunition boxes, a 22-caliber rifle, a 38-caliber Derringer, a shotgun, a 45-caliber automatic pistol, a ballistic tactical vest, a box of blue latex gloves, a metal grinder, quart size cans of mineral spirits and acetone, and metal detecting equipment associated with Riegle. A search of Martin's box truck revealed two gun cases, ammunition boxes, a Glock 9 millimeter pistol, and a receipt listing the pistol's brand, model, and serial number and Martin's name. Indiana State Police Sergeant Duane Datzman, a crime scene technician, swabbed the barrel and part of the slide of the Glock for DNA.

[11] Idelle Ritterskamp, a forensic biologist employed by the Indiana State Police Laboratory, tested the swabs taken from the Glock 9 millimeter, obtained a DNA profile from one of the swabs related to the slide back grip, determined that the DNA profile originated from one person, and concluded that Martin was a contributor to that profile and that "the DNA profile is at least 1 trillion times more likely [to have] originated from Rhett Martin than [] from an unknown unrelated individual." *Id.* at 160. She also excluded Muse as a contributor to the DNA sample. Rafael Perez, a forensic firearms examiner employed by the Indiana State Police Laboratory Division, determined that the bullet jacket recovered from the autopsy was fired from the Glock 9 millimeter.

[12] Also on December 11, 2019, Indiana State Police Detective Benjamin Lee Rector, a certified forensic cell phone examiner, interviewed Martin. Martin indicated that his last interaction with Nick occurred in January or February when he sent Nick nude pictures of Sonya and "alluded to Nick that . . . although you may be with her now all [sic] be with her at some point in time after." *Id.* at 201. Martin said that he and Muse were home on the night of December 5th and that, if Muse left, it would have been after he went to sleep. Martin said that he previously had a hard drive from Riegle's computer tower but had "trashed it." *Id.* at 205. He also said that Riegle's hidden camera resulted in Sonya having trust issues, and that he did not know where Riegle lived. Indiana State Police Detective Greg Edwards examined Martin and Muses's phone records and determined that their phones showed no outgoing

activity between December 4th and 6th, 2019, and that "both of them have their data back up and going after the 6[th]." Transcript Volume 5 at 31.

[13] On December 16, 2019, the State charged Martin with: Count I, murder; Count II, felony murder for killing Riegle while committing or attempting to commit burglary; Count III, felony murder for killing Riegle while committing or attempting to commit robbery; and Count IV, arson as a level 4 felony. The State also alleged Martin was subject to an enhancement based upon his use of a firearm pursuant to Ind. Code § 35-50-2-11.

[14] During the jury trial, the State presented the testimony of, among others, Investigator Tanasovitch, Detective Edwards, Detective Russell, Sergeant Datzman, Detective Rector, Dr. Wolf, Ritterskamp, Perez, Sonya, Nick, Ray, and Riegle's neighbors and coworkers. The State introduced and the court admitted a surveillance video recording showing a small silver passenger car driving in the early morning hours of December 6, 2019, as well as a photo of a silver passenger car parked outside of Martin's residence.

[15] During Detective Edwards's testimony and while outside the presence of the jury, Martin's counsel asked the court for permission to ask Detective Edwards about the contradictions Muse made to him during interrogations of him on December 11th and 12th. The court asked how he could impeach someone who had not testified, and defense counsel stated: "Well, first of all we don't know if [Muse] is going to testify, he's listed as a witness, uh, you know I might

call him as a witness if the State doesn't call him as a witness . . . ." Transcript Volume 3 at 116.

[16] During an offer of proof, Detective Edwards testified that he interrogated Muse on December 11th and 12th, Muse initially denied involvement in the crime, he later stated that he was the lookout for Martin from across the street, and he also stated that he was at the corner of the house when Martin entered the house. Detective Edwards stated that Muse initially denied having anything to do with the keys stolen from Riegle and later stated that he ground down the keys. After the offer of proof, Martin's counsel asked the court to allow him to ask those questions during the cross-examination of Detective Edwards. The court stated it would take the matter under advisement and that "one has to question how we attempt to impeach Muse if he hasn't even taken the stand . . . ." *Id.* at 122. The prosecutor stated that Martin was "entitled to call any witness he wants, I feel strongly he can't trot up Mr. Muse I [sic] front of a jury only to uh, ask Mr. Muse questions and have Mr. Muse invoke his right to remain silent." *Id.* at 123. Martin's counsel stated: "[W]e still have to make a record of him pleading the 5th." *Id.* The court stated: "Uh hum outside the presence of the jury I would say." *Id.* The court then told defense counsel that he could subpoena Muse, and defense counsel stated: "Of course, I could." *Id.* at 124.

[17] During a break, Martin's counsel indicated that he was going to call Muse and anticipated that Muse would plead the Fifth Amendment. The following exchange occurred:

> [Defense Counsel]: . . . I mean it's sort of a separate body of law, about the defendant has the right to put on a defense.
>
> COURT: And so, by that you mean, play this out a little bit more I guess, that if you get your way and you can call Muse and he can either plead the fifth, in their presence or not in their presence, either way you would intend for him to do so on the record, right?
>
> [Defense Counsel]: Yes.
>
> COURT: And then you would anticipate that you get to call . . . certain other witnesses to the stand, because he is now unavailable, true?
>
> [Defense Counsel]: Yes.

Transcript Volume 4 at 216.

[18] Later during the trial, Muse's counsel indicated outside the presence of the jury that Muse received a subpoena from Martin's counsel and advised the court that Muse would "be taking the fifth." Transcript Volume 5 at 60. The following exchange occurred:

> COURT: So, we've been instructed by his attorney that he's going to be here, I'll place him under oath, he'll take the stand, he can identify himself and then we will let him reaffirm that he is pleading the fifth. So, [Defense Counsel] do you intend to renew your request and your offer of proof after that?
>
> [Defense Counsel]: No, Your Honor we are going to let the record stay as it is.
>
> COURT: Are you withdrawing that request?

> [Defense Counsel]: No, no, we made an offer of proof and that's about as good as it gets for us.

Id. at 61. The court and defense counsel discussed the offer of proof, Martin's right to counsel, and his right to confront Muse. The court stated:

> And so, in summary that offer to prove back then and even now after Muse pleads the fifth, doesn't mean he's going to, that pulls in 3 or 4 legal areas with very messy, muddy waters and I just wanted to advise you that overruling that previously is not the same as overruling it after he's plead the fifth.

Id. at 68. Outside the presence of the jury and without a specific objection at that point from Martin that the questioning occurred outside the presence of the jury, the court asked Muse if he intended to and was "pleading the fifth," and Muse answered affirmatively. *Id.* at 69. The prosecutor stated: "That's fine with the State," and Martin's counsel stated: "That's fine by us." *Id.* The State rested, and Martin's counsel stated: "And then the Court having considered our motions, we rest." *Id.* at 71.

[19] Martin's counsel asserted that his office sent in a proposed instruction indicating that Martin "called Mr. Muse as a witness and he exercised his right to remain silent under the 5th Amendment." *Id.* at 90. The prosecutor objected, stating: "I don't see how that's any different then requiring him to come up here and do that in front of them, which the defense cannot do." *Id.* at 91. Defense counsel incorporated its argument from the previous day and stated that "[w]e

wanted to parade [Muse] in front of the jury and make him say 'I take the 5th.'" *Id.* The court stated in part:

> [W]hen Mr. Muse came in here today he had an attorney and I don't know, it's just that whole atmosphere of the person appearing, you know, well today in hand cuffs and in orange from the jail outfit, it's clear that he has his own case pending, it's clear why he doesn't want to testify. To simply give a one-line instruction like that highlights it in a way that doesn't really share all the details and the atmosphere in the Courtroom when someone actually appears, so of the two I think it's more harming to give the instruction by itself than it is to have the person appear in front of a jury.

Id. at 92.

[20] On October 22, 2020, the jury found Martin guilty as charged. The prosecutor asked the court to enter judgment of conviction on all four counts, and the court did so. In the second phase of the trial, the jury found that Martin used a firearm in the commission of murder.

[21] In its sentencing order, the court observed that Martin had pending charges in both Tippecanoe County and Newton County and was out on bond at the time of the murder. The court stated that Martin "stalked his victim, driving around with much planning and preparation" and "put much time and effort into planning the murder and arson." *Id.* at 57. It expressed "great concern about the nature and circumstances of this crime and what it indicates about [his] character, and the likelihood of him committing similar offenses if given an opportunity." *Id.* It found that Martin's "lack of emotion and remorse [were]

very offensive and further indications of his character and likelihood to reoffend." *Id.* The court found Martin's military service to be a slight mitigator. It gave Martin's minimal family support "some mitigating weight." *Id.* The court found as aggravators that Martin was out on bond at the time of the offenses, did not have a good work ethic, was behind in his child support payments in excess of $30,000, and had a prior criminal history. It found the aggravating circumstances substantially outweighed the mitigating circumstances. The court sentenced Martin to sixty-five years for Count I and enhanced the sentence by fifteen years due to the firearm enhancement. It sentenced Martin to twelve years for Count IV, arson, and ordered the sentence to be served consecutive to Count I for an aggregate sentence of ninety-two years. *Id.*

Discussion

I.

[22] The first issue is whether the trial court denied Martin's constitutional right to present a defense. Martin contends that his right to present a defense guaranteed by the Sixth Amendment of the United States Constitution and Article 1, Section 13, of the Indiana Constitution was violated when he was prevented from calling Muse in front of the jury to invoke his right against self-incrimination. He asserts his theory of defense was that Muse was the guilty party and that he sought to present Muse to the jury to force him to either testify or assert his right against self-incrimination. He acknowledges the Indiana Supreme Court referenced this issue in *Stephenson v. State*, 864 N.E.2d

1022 (Ind. 2007), *reh'g denied*, *cert. denied*, 522 U.S. 1314, 128 S. Ct. 1871 (2008), and held that defendants do not have a right to force a witness to invoke the witness's right against self-incrimination before the jury.

[23] With respect to the State's assertion that Martin waived his argument, the record reveals that, while Martin's counsel stated at one point that he would have to make a record of Muse pleading the Fifth Amendment, the court stated "outside the presence of the jury I would say," and Martin's counsel did not object. Transcript Volume 3 at 123. Later, outside the presence of the jury and without a specific objection at that point that the questioning occurred outside the presence of the jury, the court asked Muse if he intended to and was "pleading the fifth," Muse answered affirmatively, "the prosecutor stated "That's fine with the State," and Martin's counsel said "That's fine by us." Transcript Volume 5 at 69.

[24] Under these circumstances, we conclude that Martin has waived his challenge. *See Stephenson v. State*, 29 N.E.3d 111, 118 (Ind. 2015) (holding that failure to timely object to the erroneous admission of evidence at trial will procedurally foreclose the raising of such error on appeal unless the admission constitutes fundamental error); *Washington v. State*, 840 N.E.2d 873, 880 (Ind. Ct. App. 2006) (holding that "a party may not present an argument or issue to an appellate court unless the party raised the same argument or issue before the trial court") (quoting *Crafton v. State*, 821 N.E.2d 907, 912 (Ind. Ct. App. 2005)), *trans. denied*.

[25] We do note that, in *Stephenson v. State*, 864 N.E.2d 1022 (Ind. 2007), the Indiana Supreme Court addressed the claim following the denial of post-conviction relief that "appellate counsel should have raised the issue that failure to allow the defense to force Siefert to invoke his right before the jury was reversible error." 864 N.E.2d at 1047. The Court held that "[t]his contention fails because defendants do not have a right to force a witness to invoke the Fifth Amendment privilege before the jury." *Id.* (citing *United States v. Castorena-Jaime*, 285 F.3d 916, 931 (10th Cir. 2002) ("The district court did not abuse its discretion by refusing to allow the Defendants to compel Castorena to appear before the jury simply to invoke his Fifth Amendment rights."); *Bowles v. United States*, 439 F.2d 536, 541 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995, 91 S. Ct. 1240 (1971)).

[26] Under current Indiana law, Martin did not have an absolute right to compel Muse to parade before the jury and assert his Fifth Amendment rights. *See id.* The *Stephenson* Court cited *United States v. Castorena-Jaime*, 285 F.3d 916, 931 (10th Cir. 2002), for the proposition that a district court did not "abuse its discretion" by refusing to allow defendants to compel a potential witness to appear before the jury simply to invoke Fifth Amendment rights. *Id.* In *Castorena-Jaime*, one of the defendants argued that the jury was "entitled" to observe the witnesses' non-verbal communication. *Id.* The Court held that there was no right to force the witness to take the stand, the jury was not entitled to draw an inference from the decision to exercise a constitutional privilege, and the trial court had not "abused its discretion" by refusing to allow

the defendant to compel the appearance before the jury solely for the purpose of open court invocation. *Id.* The application of an abuse of discretion standard implies that the trial court had discretion, and thus there is no blanket prohibition against permitting such a witness in limited circumstances.

[27] We cannot say that *Stephenson* stands for the proposition that a witness who is expected to ultimately invoke his privilege when asked an incriminating question is categorically barred from being called as a witness. It is not a given that a witness who might be asked an incriminating question is called *solely* to have the witness invoke his privilege before the jury. Such a witness might be an occurrence witness who is needed to provide foundational facts as to the circumstances surrounding an event. The witness might make an identification or offer some corroboration of a fact in issue. In some circumstances, a trial court might make a decision on availability during the motion in limine proceedings, and exercise discretion to conclude that a witness who will predictably be unwilling to give self-incriminating testimony could nevertheless be called as a witness by the defense to provide non-incriminating evidence. At most, *Stephenson* recognizes that there is no right to force a witness to take the stand *solely* to invoke a Fifth Amendment privilege.

[28] And *Stephenson*, read in conjunction with the Indiana Supreme Court's decision in *Johnson v. State*, 719 N.E.2d 812 (Ind. 1999), does not preclude a defense strategy of using a co-defendant's refusal to testify to bolster a theory that the co-defendant is the guilty party. In *Johnson*, an appeal from the denial of a petition for post-conviction relief, the Indiana Supreme Court held that

Johnson's attorney had not rendered ineffective assistance of counsel for failing to request an immediate limiting instruction after Johnson's accomplice invoked his Fifth Amendment right in the presence of the jury. *Id.* at 815. The Court further held that the actions of Johnson's attorney of pointing out to the jury that Johnson's accomplice had refused to testify "could represent a reasonable trial strategy to . . . bolster the defendant's theory" that the accomplice had committed the crime instead of Johnson. *Id.*

[29] Thus, in Indiana, a defendant may not force a witness to take the stand solely to garner a favorable inference from the invocation of privilege, but the defendant is not precluded from using – in defense argument or proffered instructions – the fact that an invocation occurred outside the presence of the jury. The question Martin has raised is whether the defense should be allowed to go further to raise an exculpatory inference – if there is sufficient evidence of guilt on the part of one other than the accused, can the suspect be called to the witness stand solely to invoke the privilege against self-incrimination?

[30] Martin cites *Gray v. State*, 368 Md. 529, 796 A.2d 697 (2002), which held that trial courts have discretion, where there is sufficient evidence of guilt of one other than the defendant, to consider permitting a defendant to call a witness to the stand to invoke his right against self-incrimination in the presence of the jury. The *Gray* Court held:

> We believe that a trial court has some discretion to consider permitting a defendant in a criminal case to call a witness to the stand to invoke his Fifth Amendment privilege in the presence of

> the jury if the trial court first determines whether sufficient evidence has been presented, believable by any trier of fact, of the possible guilt of the witness the defendant wants to cause to invoke his Fifth Amendment privilege before the jury. The court, in the exercise of that discretion, must consider, as well, the prejudice to the defense of not allowing the potentially exculpatory witness to invoke his Fifth Amendment privilege in the presence of the jury. In opining that such discretion exists, we note that such testimony, if permitted, might be subject to the same restraints that a trial judge normally may exercise as to relevancy, repetitiveness, and the like.

Id. at 559; 796 A.2d at 714. It reiterated that there must be evidence "so that any trier of fact might possibly and reasonably believe that the proposed witness might have committed the crime instead of the defendant" to permit the trial court to "proceed with an analysis of whether the defendant would be unfairly prejudiced by prohibiting this witness from invoking his Fifth Amendment privilege in the presence of the jury." *Id.* at 562; 796 A.2d at 716.

[31] We cannot say that the credence and rationale of *Gray* is in direct conflict with *Stephenson*. The *Stephenson* Court did not indicate that the trial court had no discretion at all. There may be particular circumstances, developed in a pretrial hearing, that would warrant allowing a defendant to call a witness notwithstanding concerns of invocation of the Fifth Amendment privilege. Nonetheless, we have concluded that Martin waived this issue.

II.

[32] The next issue is whether Martin's convictions for Counts II and III for felony murder should be vacated. Martin argues that the abstract of judgment and sentencing order should be corrected to reflect that the convictions for felony murder were vacated with the entry of a conviction and sentence for murder. The State acknowledges that the convictions for Counts II and III should have been vacated. We reverse and remand with instructions to vacate the judgments of convictions for Counts II and III. *See Ruffin v. State*, 725 N.E.2d 412, 415 (Ind. 2000) (holding that it is well-settled that a defendant may not be convicted of both knowing or intentional murder and felony murder for the killing of the same person); *Kennedy v. State*, 674 N.E.2d 966, 967 (Ind. 1996) ("For purposes of double jeopardy, this [C]ourt has long held that a trial court may not convict and sentence a defendant for both murder and felony murder where only one murder occurs."); *Abron v. State*, 591 N.E.2d 634, 637 (Ind. Ct. App. 1992) (holding that a conviction even without a sentence is in violation of double jeopardy and must be vacated), *trans. denied*.

III.

[33] The next issue is whether the evidence is sufficient to sustain Martin's convictions for murder and arson. Martin argues that the case was entirely circumstantial, one would expect to find his DNA on a firearm he owned, the murder weapon was found in the back of a box truck that he and Muse could access, Riegle's metal detectors were found in his and Muse's shared residence

with no indication of who had brought them there, and both he and Muse had access to the grinder. He also asserts the fact that Riegle had been shot with a smaller caliber weapon "could have been heard by [him] from Muse, after Muse committed the murder." Appellant's Brief at 22. He contends that there was "no real way of discerning who shot Riegle." *Id.* at 23.

[34] When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh'g denied*. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. *Id.* We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.*

[35] Ind. Code § 35-42-1-1 provides that a person who knowingly or intentionally kills another human being commits murder, a felony. Ind. Code § 35-43-1-1 provides that a person who, by means of fire, explosive, or destructive device, knowingly or intentionally damages a dwelling of another person without the other person's consent commits arson, a level 4 felony. "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." Ind. Code § 35-41-2-2(a). "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2(b).

[36] The record reveals that Martin told Sonya that he thought Nick and Riegle removed Riegle's camera and equipment, but later admitted that he had it and

had seen the pictures of her and her daughters. Martin communicated threats to Sonya regarding Nick. Nick observed Martin sitting outside of his house waiting for him and Sonya. While Detective Russell testified that he never told Martin the caliber of the weapon used in the murder, Martin told Ray that the shotgun he was attempting to sell had not been used in the murder and the police had told him that a smaller caliber weapon was used in the homicide. A search of Martin's trash revealed two keys which had been ground down, latex gloves, and tissue paper with what appeared to be blood stains. Ray, who was at Martin's house at the time the trash can was removed and later returned, observed that Martin "was pretty freaked out about that." Transcript Volume 4 at 19. Investigator Tanasovitch collected an acetone can from the scene of the arson. A search of Martin's residence revealed a metal grinder, quart size cans of mineral spirits and acetone, and metal detecting equipment associated with Riegle. Law enforcement found a Glock 9 millimeter pistol in Martin's box truck. Ritterskamp, the forensic biologist, obtained a DNA profile from one of the swabs related to the slide back grip, determined that the DNA profile originated from one person, and concluded that Martin was a contributor to that profile and that "the DNA profile is at least 1 trillion times more likely [to have] originated from Rhett Martin than [] from an unknown unrelated individual." Transcript Volume 4 at 160. She also excluded Muse as a contributor to the DNA sample. Perez, the forensic firearms examiner, determined that the bullet jacket recovered from the autopsy was fired from the pistol. Detective Edwards determined that the phones of Martin and Muse showed no outgoing activity between December 4th and 6th, 2019, and that

"both of them have their data back up and going after the 6[th]." Transcript Volume 5 at 31. We conclude that the State presented evidence of probative value from which a reasonable jury could have determined beyond a reasonable doubt that Martin was guilty of murder and arson.

IV.

[37] The next issue is whether Martin's sentence is inappropriate in light of the nature of the offenses and his character. Martin argues that Riegle was killed by a single shot to his neck and it appeared he died quickly and was already deceased at the time of the arson. He asserts that he had two old and minimal convictions at the time of his sentencing, he served in the military, he was a volunteer firefighter for about two years, and he is not in the worst class of offenders. The State argues that Martin's sentence is not inappropriate.

[38] Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[39] Ind. Code § 35-50-2-3 provides that a person who commits murder shall be imprisoned for a fixed term of between forty-five and sixty-five years, with the advisory sentence being fifty-five years. Ind. Code § 35-50-2-5.5 provides that a person who commits a level 4 felony shall be imprisoned for a fixed term of

between two and twelve years, with the advisory sentence being six years. Ind. Code § 35-50-2-11 provides that, if the jury finds that the State has proved beyond a reasonable doubt that the person knowingly or intentionally used a firearm in the commission of murder, the court may sentence the person to an additional fixed term of imprisonment of between five and twenty years.

[40] To the extent Martin received the maximum sentences for murder and arson, the Indiana Supreme Court has noted that "the maximum possible sentences are generally most appropriate for the worst offenders." *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002).

> This is not, however, a guideline to determine whether a worse offender could be imagined. Despite the nature of any particular offense and offender, it will always be possible to identify or hypothesize a significantly more despicable scenario. Although maximum sentences are ordinarily appropriate for the worst offenders, we refer generally to the *class* of offenses and offenders that warrant the maximum punishment. But such class encompasses a considerable variety of offenses and offenders.

Id. We note that Ind. Code § 35-50-2-11 provides for a firearm enhancement of between five and twenty years and the trial court enhanced Martin's sentence on Count I by fifteen years. Thus, Martin did not receive the maximum aggregate sentence.

[41] Our review of the nature of the offenses reveals that Martin shot Riegle in the neck and set his body and residence on fire. The trial court stated:

> The nature and circumstances of this case, although [the prosecutor] used the term lying in wait, if we say lying in wait, most of us probably visualize somebody hiding behind the bush, hiding around the corner, someone comes home or someone shows up and we shoot them. This one is a little unique in the sense that this is driving around the house, this is seeing what time, apparently the victim is doing things, when he's leaving, what time, things are happening in his house. In other words, a lot of planning going on . . . a lot of stalking and preparing going on. That's like lying in wait outside the persons [sic] home, hiding on the outside, if you will.
>
> * * * * *
>
> In other words, Mr. Martin is far more scary than the other kinds of people that we can think of that might of [sic] committed murder . . . .

Transcript Volume 6 at 13. The court also described the murder as "very egregious" and stated that Martin "threw stuff on his body and burnt him, to boot" and "[t]hat's an arson at a different level." *Id.* at 13-14.

[42] Our review of the character of the offender reveals that Martin was convicted of "[f]ailure to [s]ign, [c]arry, [d]isplay [r]egistration or [p]late" as a misdemeanor in 1995. Appellant's Appendix Volume II at 47. The presentence investigation report ("PSI") indicates that the State charged Martin in 1999 with resisting law enforcement as a class D felony, driving while suspended, and exceeding the speed limit, and he pled guilty to resisting law enforcement as a class D felony in 2000. It states that Martin reported that he received a felony conviction, was placed on probation, and violated probation because he failed to pay child support. It also indicates that Martin stated that "the case had been expunged,"

"[t]he convictions were expunged/sealed on May 19, 2014," and "[t]he [c]ourt[']s records were unsealed on November 9, 2020." *Id.* At the time of sentencing, Martin had pending charges in Newton County of performing sexual conduct in the presence of a minor and performance before a minor that is harmful to minors as level 6 felonies under one cause number, as well as two counts of stalking as level 5 felonies under a separate cause number. Martin also had pending charges in Tippecanoe County of conspiracy to commit burglary and burglary as level 4 felonies, and theft of a firearm and theft as level 6 felonies. At the sentencing hearing, Martin's counsel indicated that Martin was out on bond in two cases when the offenses occurred.

[43] The PSI indicates that Martin has an eighteen-year-old son and a nineteen-year-old daughter and that he is $30,645.57 in arrears on child support. Martin reported that he was self-employed in the construction remodel business and previously worked for Anderson Builders and Miller Flooring. Miller Flooring personnel told police that Martin was released from work for making at least two customers uncomfortable enough to file complaints against him.

[44] The PSI indicates that Martin enlisted in the Army on January 3, 2001, and served as an infantryman until January 2, 2004. During his service, he was awarded several "meritus citations" and was given an honorable discharge. Appellant's Appendix Volume II at 52. Martin's overall risk assessment score using the Indiana Risk Assessment System placed him in the high risk to reoffend category.

[45] The probation officer preparing the PSI wrote that Martin "seemed cold, and arrogant or smug" during the interview. *Id.* at 54. She also wrote that Martin gave "zero indication of any remorse," stared at her for long periods, gave misleading information regarding his criminal history and child support, and "seemed to give a cocky smirk" when asked about the offense. *Id.*

[46] After due consideration, we conclude that Martin has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offenses and his character.

[47] For the foregoing reasons, we affirm Martin's convictions for murder and arson and reverse and remand with instructions to vacate his convictions for Counts II and III.

[48] Affirmed in part, reversed in part, and remanded.

Bailey, J., and Weissmann, J., concur.