MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Joshua Vincent
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Sierra A. Murray
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Ivory S. Smith
Appellant-Defendant,

v.

State of Indiana
Appellee-Plaintiff.

May 10, 2023

Court of Appeals Case No. 22A-CR-1005

Appeal from the Marion Superior Court

The Honorable Angela Dow Davis, Judge

Trial Court Cause No. 49D27-1908-MR-33766

Memorandum Decision by Judge Kenworthy
Judges Bradford and Pyle concur.

Kenworthy, Judge.

Case Summary

[1] Ivory S. Smith fatally shot her fiancé and her fiancé's infant nephew. She also shot and wounded her fiancé's mother. Smith appeals her convictions of voluntary manslaughter, a Level 2 felony,[1] involuntary manslaughter, a Level 5 felony,[2] and criminal recklessness, a Level 5 felony,[3] as well as her aggregate sentence of thirty-two years, with two years suspended to probation.

[2] Smith argues the trial court presented an erroneous jury instruction on self-defense. In addition, she claims her sentence is inappropriate in light of the nature of the offenses and her character. Concluding the trial court did not err, and Smith's sentence does not warrant revision, we affirm.

Facts and Procedural History

[3] Smith and her fiancé, William Wilson ("William"), lived in a two-story home with William's mother, Deborah Wilson ("Deborah"), and Deborah's then-fiancé.[4] William's sister, Dynisha Wilson ("Dynisha"), and Dynisha's child, three-month-old K.W., also lived there. All three of the home's bedrooms were

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[1] Ind. Code § 35-42-1-3 (2018).

[2] I.C. § 35-42-1-4 (2018).

[3] I.C. § 35-42-2-2 (2019).

[4] Deborah and her fiancé married after the events at issue here, at which time she took Wilson as her last name.

on the second floor. Smith and William shared a bedroom, as did Dynisha and K.W. Deborah and her fiancé used the third bedroom.

[4] On the morning of August 24, Dynisha woke up and got ready to go to work. She put K.W. in Deborah's room, where Deborah was resting. Deborah's fiancé was absent. Dynisha also saw Smith before she left. Dynisha asked Smith to wake up William later, and Smith agreed. Dynisha did not "notice anything unusual" about Smith's behavior. *Tr. Vol. 2* at 246.

[5] That afternoon, Deborah was in her bedroom with K.W. when she heard several gunshots from somewhere in the home. She called out to William, but he did not respond. Deborah turned to the doorway to her room, which was partially ajar, just as Smith pushed the door open. Smith had a handgun and fired three shots. Smith directed the first shot down at K.W. as he lay on a bed, and she aimed the second and third shots at Deborah, striking her in the left arm and shoulder. Deborah fell to the floor and asked, "Ivory, what are you doing?" *Tr. Vol. 3* at 29. Smith turned and walked away from the room. Next, Deborah picked up K.W. and saw he had been shot in the head. She called 911. Smith also called 911.

[6] Officer Michael McWhorter was the first officer to arrive at the home. The front door was open, so he knocked and announced he was a police officer. A person responded to Officer McWhorter but did not come to the door. As a result, Officer McWhorter entered the home and saw a person he later identified as Smith. She was unarmed and told the officer, "I shot him." *Tr.*

Vol. 2 at 207. Officer McWhorter handcuffed Smith and asked her who she had shot. Smith "nudged with her head," *Id*. at 208, directing the officer's attention to the stairs. Officer McWhorter saw a body at the base of the stairs. The body was later identified as William's.

[7] Next, several other officers arrived. One of them took Smith to a vehicle while Officer McWhorter and several others went upstairs. They found Deborah sitting on the floor, still speaking with a 911 dispatcher. Deborah was holding K.W., who was dead.

[8] A detective questioned Smith later the same day. Smith told the detective she and William had argued earlier and she was scared, but she conceded he was not preventing her from leaving their bedroom and was not "trying to get [her]." *Tr. Vol. 3* at 200.

[9] A crime scene specialist discovered blood spatter in William and Smith's bedroom. The specialist also found a handgun and seven spent bullet cartridges on the home's second floor. A firearms examiner later determined the handgun had fired all seven cartridges. And subsequent DNA testing of swabs taken from the handgun revealed Smith and an unidentifiable male likely contributed DNA to the swabs.

[10] A pathologist determined K.W. died due to a single gunshot wound to the left side of his head. The same pathologist examined William's body and learned he had suffered nine gunshot wounds to the "chest, abdomen, and the left upper arm and armpit region." *Id.* at 91. Some wounds were entry and exit wounds

caused by the same gunshot. The pathologist further stated two of the shots had struck William in the back. And another shot had penetrated William's heart and both of his lungs, which would have caused him to lose consciousness in four to five minutes and to die within ten to fifteen minutes.

[11] The State charged Smith as follows: count one, murder, a felony, for fatally shooting William;[5] count two, murder, a felony, for fatally shooting K.W.; and count three, Level 1 felony attempted murder,[6] for shooting Deborah. Smith filed a Notice of Self Defense.

[12] At trial, Smith told the jury she shot William because she feared for her life. In particular, she stated she and William had physically fought the previous night, and William had strangled her to the point of unconsciousness while threatening to kill her. Smith further stated the fight with William had started when they threw alcoholic drinks at each other, and she then hit his torso.

[13] Smith also claimed she and William had argued the morning of the shooting after William told her to pack up and leave the home, and he had grabbed her legs as she crawled across their bed to get to the bathroom. Next, Smith stated she shot William, and he ran out of their bedroom. Smith then testified she walked down the hall to Deborah's room, opened the door, and immediately shot into the room without first seeing who was inside. She alleged she fired

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[5] I.C. § 35-42-1-1 (2018).

[6] I.C. §§ 35-42-1-1 (murder); 35-41-5-1 (2014) (attempt).

until the handgun ran out of bullets and she heard Deborah call her name. Finally, Smith told the jury she left Deborah's room and went downstairs, where she found William's body at the base of the stairs before calling 911.

[14] The jury determined Smith was guilty of lesser included offenses for each count: voluntary manslaughter for count one (Wilson); involuntary manslaughter for count two (K.W.); and criminal recklessness for count three (Deborah). The trial court imposed an aggregate sentence of thirty-two years, with two years suspended to probation. This appeal followed.

Discussion and Decision

Jury Instruction on Self-Defense

[15] Smith claims the trial court's judgment must be reversed because the court gave the jury an erroneous instruction on self-defense. Instructing the jury lies within the discretion of the trial court. *Hartman v. State*, 669 N.E.2d 959, 962 (Ind. 1996). In general, we will reverse a court's decision on instructing the jury if giving an instruction amounts to an abuse of discretion. *Id.* An abuse of discretion occurs when the court's decision is clearly against the logic and effect of the facts and circumstances. *Bennett v. State*, 119 N.E.3d 1057, 1058 (Ind. 2019). But when an appellant challenges a jury instruction as an incorrect statement of law, we apply a de novo standard of review. *Batchelor v. State*, 119 N.E.3d 550, 554 (Ind. 2019).

[16] In reviewing a trial court's decision to give or refuse tendered jury instructions, we consider: (1) whether the instruction correctly states the law; (2) whether

there is evidence in the record to support giving the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions. *Chambers v. State*, 734 N.E.2d 578, 580 (Ind. 2000). The parties' dispute focuses on the trial court's Final Instruction Number Nine ("Instruction Nine"):

> It is an issue whether the defendant acted in self-defense or defense of another person.
>
> A person may use reasonable force against another person to protect herself or another person from what the defendant reasonably believes to be the imminent use of unlawful force.
>
> A person is justified in using deadly force, and does not have a duty to retreat, only if she reasonably believes that deadly force is necessary to prevent serious bodily injury to herself or another person.
>
> The State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.
>
> However, a person may not use force if:
>
> She provokes a fight with someone with intent to cause bodily injury to that person.
>
> Or she has willingly entered into a fight with another person or started the fight, unless she withdraws from the fight and communicates to the other person his [sic] intent to withdraw and the other person nevertheless continues or threatens to continue the fight.

Appellant's App. Vol. 2 at 208; *see also Tr. Vol. 4* at 3–4.

[17] Smith first argues Instruction Nine was an incorrect statement of law. The State correctly points out Smith objected at trial to Instruction Nine as being unsupported by the evidence, not as an incorrect statement of law. *Tr. Vol. 3* at 224–225. As a result, Smith has waived appellate review of whether the jury

instruction correctly states the law. *See Houser v. State*, 823 N.E.2d 693, 698 (Ind. 2005) ("A defendant may not object on one ground at trial and raise another on appeal; any such claim is waived").

[18] Anticipating waiver, Smith argues the trial court's failure to recognize Instruction Nine misstated the law amounted to fundamental error. The doctrine of fundamental error is a "narrow exception" to waiver. *Miller v. State*, 188 N.E.3d 871, 874 (Ind. 2022). An error is fundamental, and may be corrected despite waiver, "only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). Put another way, the fundamental error exception addresses only errors "so blatant that the trial judge should have acted independently to correct the situation." *Kelly v. State*, 122 N.E.3d 803, 805 (Ind. 2019).

[19] Instruction Nine closely tracks the relevant language of Indiana's self-defense statute, especially the subsections explaining when a defendant may not use force in self-defense:

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

> if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person, employer, or estate of a person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.
>
> * * * * *
>
> (g) Notwithstanding subsections (c) through (e), a person is not justified in using force if:
>
> (1) the person is committing or is escaping after the commission of a crime;[7]
>
> (2) the person provokes unlawful action by another person with intent to cause bodily injury to the other person; or
>
> (3) the person has entered into combat with another person or is the initial aggressor unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue unlawful action.

I.C. § 35-41-3-2 (2019). A jury instruction that follows the language of a statute is unlikely to be a fundamental misstatement of law. *See, e.g., Ben-Yisrayl v. State*, 729 N.E.2d 102, 111 (Ind. 2000) (rejecting appellant's challenge to jury instruction on mental culpability; the instruction correctly stated the law because it used the statutory definitions of the relevant terms).

[7] During the final jury instructions conference in this case, the parties agreed this subsection of the statute was inapplicable, and the trial court excluded from Instruction Nine language tracking this subsection.

[20] Instruction Nine also closely follows the language of Indiana's pattern jury instruction on self-defense, especially as to the relevant exceptions explaining when a person may not use force:

> It is an issue whether the Defendant acted in [self-defense or defense of another person].
>
> A person may use reasonable force against another person to protect (himself/herself from what he/she) or (someone else) from what the Defendant reasonably believes to be the imminent use of unlawful force.
>
> A person is justified in using deadly force, and does not have a duty to retreat, only if he/she reasonably believes that deadly force is necessary [to prevent serious bodily injury to himself/herself or a third person or to prevent the commission of a forcible felony].
>
> However, a person may not use force if:
>
> * * * * *
>
> (he/she provokes a fight with another person with intent to cause bodily injury to that person).
>
> (or)
>
> (he/she has willingly entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue the fight).
>
> The State has the burden of proving beyond a reasonable doubt that the Defendant did not act in self-defense.

Indiana Criminal Pattern Jury Instruction No. 10.0300, Use of Force to Protect Person (Indiana Judges' Association 2021). The preferred practice in Indiana is

to use pattern jury instructions. *Santiago v. State*, 985 N.E.2d 760, 763 (Ind. Ct. App. 2013), *trans. denied*.

[21] Despite these points, Smith argues Instruction Nine should have also informed the jury there must be an "immediate causal connection" between conduct precluding the use of force in self-defense, such as provoking or willingly entering into a fight, and the confrontation from which the self-defense claim arises. *Appellant's Br.* at 23. She cites *Mayes v. State*, 744 N.E.2d 390 (Ind. 2001), in support of her argument. *Mayes* addressed the self-defense exception set forth in Indiana Code section 35-41-3-2(g)(1), which provides a person may not use force in self-defense if "the person is committing or is escaping after the commission of a crime." By prior agreement of the parties, subsection (g)(1) is not at issue here. In any event, in *Mayes* the Indiana Supreme Court determined the self-defense instruction correctly stated the law because the instruction was "a near verbatim recitation of the self-defense statute." 744 N.E.2d at 394. Likewise, the instruction in Smith's case follows the relevant language of the self-defense statute. The holding in *Mayes* does not compel us to conclude Instruction Nine misstates the law so blatantly as to amount to fundamental error.

[22] Smith also cites *Gammons v. State*, 148 N.E.3d 301 (Ind. 2020). *Gammons*, like *Mayes*, addressed the self-defense exception set forth in Indiana Code section 35-41-3-2(g)(1) (committing or escaping after committing a crime), which does not apply to Smith's case. Even so, in *Gammons* the defendant raised a claim of self-defense against a charge of murder. The defendant had also been charged

with carrying a handgun without a license, and the State argued the defendant's self-defense claim lacked merit because he was committing the offense of unlicensed gun possession when he shot and killed the victim. The Indiana Supreme Court determined the self-defense instruction, which required the State to prove the crime was "directly and immediately related to the confrontation," was an imprecise statement of law. 148 N.E.3d at 304. Instead, the Court, discussing *Mayes* and other cases, determined there must be an "immediate causal connection" between the crime and confrontation, and the instruction was erroneous because it did not adequately explain the relationship. *Id.*

[23] Smith does not direct us to any Indiana Supreme Court cases extending the holding in *Gammons* to the other subsections of Indiana Code section 35-41-3-2(g). And "the mere fact that certain language or expressions are used in the opinions of Indiana's appellate courts" does not mean such language is proper to include in jury instructions. *Gravens v. State*, 836 N.E.2d 490, 494 (Ind. Ct. App. 2005), *trans. denied*. As noted, Instruction Nine, like the instruction at issue in *Mayes*, follows the language of the governing statute. On the question of whether Instruction Nine correctly states the law, Smith has not shown a blatant violation of basic principles resulting in deprivation of due process. She has also not demonstrated any error was so blatant as to require the trial court to act on its own to address the issue. Smith's claim of fundamental error must fail.

[24] Smith also argues Instruction Nine lacks evidentiary support. She preserved this argument for appellate review. Smith claims: (1) her physical altercation with William from the night before the shooting lacked an immediate causal connection to the confrontation just before the shooting; and (2) she did not provoke or willingly join in a physical altercation with William on the day of the shooting. We disagree as to Smith's first point, which disposes of her argument. At trial, Smith conceded her argument with William just before the shooting stemmed from their physical fight on the previous evening. Specifically, she stated they argued after William said he "want[ed] me to leave, because we had got into it the night before." *Tr. Vol 3* at 172.

[25] Smith also told the jury during closing statements to consider the previous night's physical altercation when asking whether Smith was in fear of unlawful harm on the day of the shooting: "[Smith], in fear for her physical safety, her safety that was just violated hours before, fires the gun." *Id.* at 239–240. It would be incongruous for the jury to be allowed to consider the physical altercation in deciding whether Smith was in fear of her life, while being forbidden from determining whether Smith's conduct in relation to the altercation (such as, whether she initiated it) would disqualify her from using force in self-defense. The evidence supports a determination the shooting was a continuation of Smith and William's altercation the night before. Under these circumstances, there was sufficient evidentiary support for Instruction Nine, and the trial court did not abuse its discretion.

Appropriateness of Sentence

[26] Smith claims her sentence is inappropriate and asks the Court to "revise her sentence downward" by an unspecified amount. *Appellant's Br.* at 36. Article 7, section 6 of the Indiana Constitution authorizes the Court to review and revise sentences. We implement this authority through Indiana Appellate Rule 7(B), which states we may revise a sentence "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."

[27] The main role of sentencing review under Appellate Rule 7(B) is to "'leaven the outliers.'" *Ramirez v. State*, 174 N.E.3d 181, 201 (Ind. 2021) (quoting *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008)). "[S]entencing is principally a discretionary function in which the trial court's judgment should receive considerable deference." *Cardwell*, 895 N.E.2d at 1222. Such deference should prevail unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character). *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015). "[W]e may look to any factors appearing in the record" in our review. *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). The defendant bears the burden of persuading us the sentence imposed is inappropriate. *Ramirez v. State*, 174 N.E.3d at 202.

[28] At the time Smith committed her offenses, the maximum sentence for a Level 2 felony was thirty years, with a minimum sentence of ten years and an advisory

sentence of seventeen and one-half years. I.C. § 35-50-2-4.5 (2014). And the maximum sentence for a Level 5 felony was six years, with a minimum sentence of one year and an advisory sentence of three years. I.C. § 35-50-2-6 (2014). The trial court sentenced Smith to twenty years for Level 2 felony voluntary manslaughter, and six years for each of the Level 5 felony offenses, with two years suspended to probation as to Smith's sentence for criminal recklessness. The court further directed Smith to serve her three sentences consecutively, for a total sentence of thirty-two years, with two years suspended. As a result, each of Smith's sentences is above the advisory sentence (and is at the maximum for both Level 5 felony convictions), but the total still falls well short of the maximum possible sentence of forty-two years.

[29] "The nature of the offenses is found in the details and circumstances of the commission of the offenses and the defendant's participation." *Croy v. State*, 953 N.E.2d 660, 664 (Ind. Ct. App. 2011). Smith concedes the consequences of her offenses are "inarguably tragic." *Appellant's Br.* at 18. She shot William multiple times, including twice in the back, as they argued after William told her she had to move out of their home. After Smith shot William, and he fled from their bedroom before dying at the bottom of the stairs, Smith walked down the hall and fired three shots into Deborah's bedroom, striking K.W. and Deborah. She argues there is "nothing in the record [showing she] was aware that K.W. was in the room when she fired the fatal shot." *Id.* at 31. But Deborah testified Smith aimed the gun down at K.W. before shooting him.

And Smith shot at Deborah until she ran out of ammunition and Deborah called out her name.

[30] Deborah was deeply traumatized by seeing her infant grandson killed in front of her. She moved out of her home after the shooting and could not move back in, even though she continues to pay the mortgage on the property. She is in counseling and reports trouble eating and sleeping because she "feel[s] sick all the time" and constantly relives K.W.'s death. *Tr. Vol. 4* at 31. Dynisha testified she had been in therapy for three years due to the deaths of her son and her brother, and Smith had "broken" her. *Id.* at 26.

[31] Smith argues she took responsibility for her actions by promptly calling 911 and surrendering peacefully. But after she shot K.W. and Deborah, she did not try to aid them, choosing instead to walk away.

[32] Smith compares the facts of her case with the circumstances in *Howell v. State*, 97 N.E.3d 253 (Ind. Ct. App. 2018), *trans. denied*, in which the Court determined the defendant's fifty-seven-year sentence for voluntary manslaughter and other offenses was not inappropriate. Howell fatally shot a woman in the head, fled with her body in a vehicle, and attempted to steal another person's vehicle by force before successfully stealing a third person's vehicle. Smith argues she showed restraint, unlike the defendant in *Howell*. We disagree. The facts of Smith's case, like the facts in *Howell*, can fairly be described as "brutal." 97 N.E.3d at 272.

[33] "The character of the offender is found in what we learn of the offender's life and conduct." *Croy*, 953 N.E.2d at 664. Smith was thirty-nine years old at sentencing. Her criminal history consists of five misdemeanor convictions, including operating a motor vehicle without a license, false informing, public intoxication, resisting law enforcement, and battery by bodily waste. Further, while she was in jail during this case, she was cited three times for violating jail rules. And Smith admitted she has used marijuana, a controlled substance, almost every day since she turned eighteen.

[34] Smith claims her sentence should be reduced because she repeatedly experienced sexual abuse and other forms of violence as a child. She also argues she has a history of physically abusive relationships, and she began to abuse alcohol after her mother and several other family members were murdered in 2015. The Indiana Supreme Court has stated, "evidence of a difficult childhood is entitled to little, if any, mitigating weight." *Bethea v. State*, 983 N.E.2d 1134, 1141 (Ind. 2013). We cannot conclude Smith's traumatizing life experiences outweigh the heinous nature of her offenses.

[35] Smith next claims William subjected her to emotional and physical abuse throughout their six-year relationship. Abusers often hide their mistreatment of victims, especially from friends and family. Even so, we must consider the record consistently with the jury's verdict. And Deborah and Dynisha stated they never saw any signs of William abusing Smith during the two years William and Smith lived with them.

[36] Smith also argues she has family and community support, as shown by eleven letters the trial court received at sentencing, to show she would do well back in the community. But Deborah and Dynisha considered Smith to be part of their family as well. At sentencing, Dynisha told Smith, "[m]y family loved you and we treated you as one of our own and you betrayed us." *Tr. Vol. 4* at 26. And Deborah told Smith, "I gave you a roof over your head." *Id.* at 29. In summary, Smith has failed to establish revision of her sentence is appropriate in light of the nature of her offenses or her character.

Conclusion

[37] For the reasons stated above, we affirm the judgment of the trial court.

[38] Affirmed.

Bradford, J., and Pyle, J., concur.