MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dustin J. McKee,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

November 3, 2023

Court of Appeals Case No. 23A-CR-549

Appeal from the Elkhart Circuit Court

The Honorable Michael A. Christofeno, Judge

Trial Court Cause No. 20C01-2108-MR-5

Memorandum Decision by Judge Bailey
Judges May and Felix concur.

Bailey, Judge.

Case Summary

[1] Dustin McKee appeals his conviction for Murder, a felony,[1] and he challenges his aggregate eighty-three-year sentence for Murder and Unlawful Possession of a Handgun by a Serious Violent Felon.[2] We affirm.

Issues

[2] McKee presents three consolidated and restated issues for review:

I. Whether any error in the jury instructions regarding sudden heat and self-defense was invited when defense counsel acknowledged that the instructions were given by agreement of the defense;

II. Whether the State presented sufficient evidence to rebut McKee's claim of self-defense and to negate the existence of sudden heat, which would mitigate murder to voluntary manslaughter; and

III. Whether his sentence is inappropriate.

Facts and Procedural History

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[1] Ind. Code § 35-42-1-1.

[2] I.C. § 35-47-4-5. McKee does not challenge the judgment of conviction for the possession offense.

[3] McKee and Brandon Lowe met in Dismas House, a facility offering transitional housing. Each of the men moved to Elkhart in 2021; McKee leased an apartment, but Lowe experienced ongoing housing insecurity. In August of 2021, McKee agreed that Lowe could move into McKee's apartment and sleep in the living room.

[4] On August 25, after both men had been drinking, a disagreement arose over whether one of them should leave to purchase household items. The situation escalated into a physical confrontation, with the men "throwing punches" for about five minutes. (Tr. Vol. III, pg. 165.) McKee, the smaller man, sustained several scrapes and bruises and a cut over one eye. He believed that Lowe "got the better end of" the fight. (*Id.* at 166.) At 7:50 p.m., in an attempt to get Lowe removed from the apartment, McKee called 9-1-1. He reported that he wanted someone out of his apartment, but did not identify Lowe by name, ostensibly because he did not want Lowe arrested for the probation violation of drinking alcohol.

[5] When officers from the Elkhart Sheriff's Department arrived and questioned the men, they denied that there had been a physical altercation between them. Lowe advised the officers that he would be moving out of the apartment at the end of the week. Because the dispute was represented as verbal and both men appeared to be too inebriated to drive, officers allowed both men to remain in the apartment but directed them to "stay separated." (*Id.* at 9.) McKee assured the officers that he would comply with that directive, and he went into his bedroom and at least partially closed the door.

[6] According to the testimony that McKee would later give at trial, Lowe "kept approaching" him and was "pissed" that McKee had called the police. (*Id.* at 185.) Also, the men began to argue over whether Lowe could use McKee's motor scooter, either to go buy window blinds or to get to work the next day. At some point, McKee put together a "gun kit" he had ordered online, pointed the assembled gun at Lowe, and told him to "get out." (*Id.* at 188.) Lowe left the room and made two phone calls.

[7] Sometime after 9:00 p.m., Lowe called Maria Stancati, the executive director of Dismas House, and expressed his concern about getting to work the next day. During the call, Stancati could hear Lowe "yelling" and "banging on a door." (*Id.* at 238.) Stancati advised Lowe to take an Uber to work, and she assured Lowe that she would pick him up after work and bring him back to Dismas House. After about fifteen minutes, Stancati perceived that Lowe had "calmed down," and she considered the situation "resolved." (*Id.* at 239-240.) Lowe also called his uncle, Mark Hensley. Sounding "distraught," Lowe asked his uncle to call McKee and find out "why he was so upset." (*Id.* at 184-85.) Hensley attempted to call McKee, but McKee had shut off his phone.

[8] At 9:21 p.m., McKee placed a 9-1-1 call. He advised the dispatcher that he had shot his roommate; he had thrown down his gun in the yard; and he would be waiting on the porch for officers to arrive. First responders found Lowe lying on the floor of McKee's bedroom, deceased. McKee admitted to officers that he shot Lowe five times in quick succession. He gave as his reason for doing so: "I was afraid I was gonna get my ass kicked." (Tr. Vol. IV, pg. 23.)

McKee claimed that he had been lying in his bed when Lowe had forced his way through a closed and locked door, acting in an aggressive manner.

[9] Officers examined the bedroom door and discovered blood spatter on the back of the door and the wall behind it, leading them to believe that the door had been closed when the shooting occurred. On August 30, the State charged McKee with murder and unlawful possession of a firearm by a serious violent felon. The State subsequently filed a request for a sentencing enhancement due to the use of a firearm.

[10] On January 25, 2023, a jury found McKee guilty of murder and possessing a handgun. In bifurcated proceedings, McKee admitted to his status as a serious violent felon and admitted that he had used a handgun in the killing of Lowe. On February 23, the trial court imposed upon McKee an aggregate sentence of eighty-three years. This consisted of a sixty-three-year sentence for murder, enhanced by ten years for the use of a firearm, and a ten-year sentence for unlawful possession of a firearm by a serious violent felon. McKee now appeals.

Discussion and Decision

Jury Instructions

[11] McKee challenges two of the final instructions, Final Instruction 4 on voluntary manslaughter and Final Instruction 8 on self-defense. First, he claims the jury was misled when the trial court directed that "[i]f you find that the State of

Indiana failed to prove the Defendant guilty of the crime of Murder you may next consider whether the Defendant committed the crime of Voluntary Manslaughter."[3] (App. Vol. II, pg. 75.)

[12] Regarding the explanation in Final Instruction Eight as to unavailability of a self-defense claim to a person committing a crime, McKee challenges the inclusion of the language that the crime be "directly and immediately connected to the confrontation." (*Id.* at 80.) He argues that a proper instruction would have informed the jury there must be an "immediate causal connection between the crime and the confrontation" and "the possession of a firearm did not cause the shooting of Brandon Lowe." Appellant's Brief at 25.[4]

[13] Instructing the jury lies within the discretion of the trial court. *Hartman v. State*, 669 N.E.2d 959, 962 (Ind. 1996). Under this standard, we look to whether evidence presented at trial supports the instruction and to whether its substance

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[3] McKee relies upon *Roberson v. State*, 982 N.E.2d 452 (Ind. Ct. App. 2013), an appeal from the denial of post-conviction relief. There, the Court found that Roberson had received ineffective assistance of counsel "with respect to failing to ensure that the jury was properly instructed regarding the elements of murder, voluntary manslaughter, and the State's burden of proof regarding sudden heat." *Id.* at 461. The trial court had verbally instructed the jury that "if the State proves the Defendant guilty of Murder, you *must* not consider the included crimes." *Id.* at 458. (emphasis in original) Among several instructional infirmities, the *Roberson* Court found that it "was a clearly incorrect statement of the law to inform the jury that it could only consider convicting Roberson of voluntary manslaughter instead of murder if it first found him not guilty of murder, given that the jury instruction for murder did not inform the jury that the State had to disprove the existence of sudden heat." *Id.* at 460.

[4] McKee relies upon *Gammons v. State*, 148 N.E.3d 301 (Ind. 2020), which addressed the self-defense exception set forth in Indiana Code section 35-41-3-2(g)(1) (committing or escaping after committing a crime). In *Gammons*, the defendant had been convicted of attempted murder and carrying a handgun without a license after the trial court instructed the jury that Gammons could not assert self-defense if he had committed a crime that was "directly and immediately related" to his confrontation with the shooting victim. *Id.* at 302. Our Indiana Supreme Court determined there must rather be an "immediate causal connection" between the crime and confrontation to preclude the assertion of self-defense. *Id.* at 306.

is covered by other instructions. *Batchelor v. State*, 119 N.E.3d 550, 554 (Ind. 2019). But when an appellant challenges an instruction as an incorrect statement of law, we apply a de novo standard of review. *Id.*

[14] McKee admits that he lodged no objection to either instruction but contends that there are instructional infirmities that amount to fundamental error. "The fundamental error doctrine serves, in extraordinary circumstances, to permit appellate consideration of a claim of trial error even though there has been a failure to make a proper contemporaneous objection during the course of a trial." *Hardley v. State*, 905 N.E.2d 399, 402 (Ind. 2009). The fundamental error doctrine is extremely narrow and applies 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. *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002) (citations omitted).

[15] But even if an error is fundamental, the invited error doctrine generally precludes a party from obtaining appellate relief for his own errors. *Miller v. State*, 188 N.E.3d 871, 874-875 (Ind. 2022) (citing *Brewington v. State*, 7 N.E.3d 946, 974-975 (Ind. 2014), *cert. denied*, 574 U.S. 1077 (2015)). That is, "a party may not take advantage of an error that [he] commits, invites, or which is the natural consequence of [his] own neglect or misconduct." *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005) (internal quotation omitted).

[16] A party invites an error if it was "part of a deliberate, 'well-informed' trial strategy." *Miller*, 188 N.E.3d at 875 (citing *Batchelor*, 119 N.E.3d at 558,

quoting *Brewington*, 7 N.E.3d at 954)). This means there must be "evidence of counsel's strategic maneuvering at trial" to establish invited error. *Id*. (citing *Batchelor*, 119 N.E.3d at 557). "[M]ere 'neglect' or the failure to object, standing alone, is simply not enough." *Id*. (citing *Batchelor*, 119 N.E.3d at 557-558). And "when there is no evidence of counsel's strategic maneuvering, we are reluctant to find invited error." *Id*. (citing *Batchelor*, 119 N.E.3d at 558). However, we have found invited error when the appellant's counsel affirmatively requests the error. Thus, in *Miller*, for example, our Supreme Court found invited error in jury instructions where defense counsel had requested the instruction and thus "did far more than simply fail to object" to it. 188 N.E.3d at 875. Similarly, in *Isom v. State*, the Supreme Court found invited error when the allegedly erroneous jury instruction was affirmatively sought by the appellant. 170 N.E.3d 623, 646 (Ind. 2021) ("An unobjected-to instruction coupled with an active request for related instructions raises the question of invited error."); *see also, e.g., Anderson v. State*, 141 N.E.3d 862, 866 (Ind. Ct. App. 2020) (finding invited error where the alleged error was the result of "the plain terms of Anderson's own plea agreement"), *trans. denied*.

[17] McKee conceded that he fatally shot Lowe but testified that he did so in self-defense. Defense counsel argued in closing that McKee had acted in self-defense; counsel alternatively argued that McKee had acted while under sudden heat such that he had committed voluntary manslaughter rather than murder. The trial court agreed to instruct the jury accordingly and the following exchange occurred:

> Court: [Prosecutor], did you have a chance to review the final instructions proposed by the Court and the verdict form?
>
> Prosecutor: I have, Your Honor.
>
> Court: May I show that they are given by agreement from the State of Indiana?
>
> Prosecutor: Yes, Your Honor.
>
> Court: [Defense Counsel], did you have a chance to review the final proposed instructions and the verdict form?
>
> Defense Counsel: Yes, Your Honor.
>
> Court: Do you have any objections or amendments to them?
>
> Defense Counsel: No, Your Honor.
>
> Court: May I show that the final instructions and verdict form are given by agreement of the defendant?
>
> Defense Counsel: Yes, Your Honor.
>
> Court: For the record, [the] Court will give final instructions and the verdict form by agreement of the parties.

(Tr. Vol. IV, pgs. 42-43.)

[18] As part of his trial strategy, McKee sought to have the jury instructed on the lesser-included offense of voluntary manslaughter and also upon the defense of

self-defense. Defense counsel was afforded the opportunity to review the court's instructions, and he affirmatively stated that: he had no objection; he had no amendment; and those instructions were to be given by agreement. Even assuming that there is instructional error, McKee invited the error by his explicit agreement with the State that the instructions should be provided to the jury in their proposed form. The claimed error is not subject to appellate review.

Sufficiency of the Evidence

[19] Self-Defense. McKee does not deny that there is sufficient evidence to establish that he knowingly killed Lowe. Rather, McKee contends that the State failed to present sufficient evidence to rebut his claim that he acted in self-defense.

[20] Indiana Code Section 35-41-3-2(c) provides in pertinent part:

> 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.

[21] "A valid claim of self-defense is legal justification for an otherwise criminal act." *Coleman v. State*, 946 N.E.2d 1160, 1165 (Ind. 2011). To prevail upon a claim of self-defense when deadly force has been used, "the defendant must show that he (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm." *McEwen v. State*, 695 N.E.2d 79, 90 (Ind. 1998).

[22] "The amount of force that an individual may use to protect himself must be proportionate to the urgency of the situation. When a person uses more force than is reasonably necessary under the circumstances, the right of self-defense is extinguished." *Pinkston v. State*, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004) (citing *Hollowell v. State*, 707 N.E.2d 1014, 1021 (Ind. Ct. App. 1999)), *trans. denied*.

[23] Once a defendant raises a claim of self-defense, the State has the burden of negating at least one of the necessary elements. *Miller v. State*, 720 N.E.2d 696, 700 (Ind. 1999). The State may meet its burden by rebutting the defense directly, by affirmatively showing the defendant did not act in self-defense, or by relying on the sufficiency of the case-in chief. *Id*. Whether the State has met its burden is a question for the trier of fact. *Id*.

[24] The standard for reviewing a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same standard used for any claim of insufficient evidence. *Id*. at 699. We neither reweigh the evidence nor judge the credibility of witnesses. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). We will reverse a

conviction only if no reasonable person could say that the State negated the defendant's self-defense claim beyond a reasonable doubt. *Id*.

[25] Lowe, an unarmed man, was shot five times. McKee admitted, during his trial testimony, that "aside from the initial fight" hours before, there was "no other physical altercation." (Tr. Vol. III, pg. 206.) The State presented sufficient evidence from which the jury could conclude that McKee's actions were disproportionate under the circumstances of the situation and thus his right to self-defense was extinguished.

[26] Sudden Heat. Alternatively, McKee argues that the evidence at most supports his conviction of voluntary manslaughter because the State failed to disprove the existence of sudden heat. According to McKee, Lowe "refused to let things go" and "barged into [the] bedroom aggressively," which caused McKee "to grab his gun and start shooting, out of anger, out of fear, out of panic." Appellant's Brief at 32.

[27] Indiana's voluntary manslaughter statute provides in relevant part:

> (a) A person who knowingly or intentionally:
>
> (1) kills another human being; . . .
>
> while acting under sudden heat commits voluntary manslaughter, a Level 2 felony.

> (b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) of this chapter to voluntary manslaughter.

[28] This statute specifies that sudden heat is a mitigating factor to murder, as opposed to an element of voluntary manslaughter. *Watts v. State*, 885 N.E.2d 1228, 1231 (Ind.2008). Once a defendant presents evidence of sudden heat, the State bears the burden of disproving its existence beyond a reasonable doubt. *Boesch*, 778 N.E.2d at 1279.

[29] "Sudden heat" is characterized as anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary person, preventing deliberation and premeditation, excluding malice, and rendering a person incapable of cool reflection. *Dearman v. State*, 743 N.E.2d 757, 760 (Ind. 2001). "The issue of whether adequate provocation legally exists is an objective—not a subjective—measure." *Carmack v. State*, 200 N.E.3d 452, 460 (Ind. 2023).

[30] Our Indiana Supreme Court has set forth the standard of review where an appellant claims that the State failed to carry its burden to negate sudden heat beyond a reasonable doubt before the jury:

> On a fundamental level, sufficiency-of-the-evidence arguments implicate a "deferential standard of review," in which this Court will "neither reweigh the evidence nor judge witness credibility," but lodge such matters in the special "province" and domain of the jury, which is best positioned to make fact-centric determinations. *See Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018). In reviewing the record, we examine "all the evidence and reasonable inferences supporting the verdict," and thus "will

> affirm the conviction if probative evidence supports each element of the crime beyond a reasonable doubt." *Id*.

Carmack, 200 N.E.3d at 459.

[31] In *Carmack*, the Supreme Court reiterated a "categorial" rule, that is: "anger alone cannot provoke sudden heat." *Id.* at 462. And while McKee insisted in his testimony that he was fearful of Lowe, the jury also heard evidence that no such claim was made to police officers earlier in the evening. Indeed, McKee denied that there had been a physical altercation. McKee admitted that no physical altercation immediately preceded the shooting. Mindful that provocation is evaluated under an objective standard, *Carmack*, 200 N.E.3d at 460, the State presented sufficient evidence to negate sudden heat beyond a reasonable doubt before the jury.

Sentence

[32] The crime of murder is punishable by forty-five to sixty-five years of imprisonment; the advisory sentence is fifty-five years. I.C. § 35-50-2-3. The imposition of an enhancement for use of a firearm results in an additional fixed term of five to twenty years. I.C. § 35-50-2-11. A person convicted of a Level 4 felony is subject to a term of imprisonment of two to twelve years, with an advisory sentence of six years. § 35-50-2-5.5. Accordingly, McKee was subject to an aggregate sentence of fifty-two years to ninety-seven years. He received an aggregate sentence of eighty-three years.

[33] McKee contends that his sentence is inappropriate in light of the nature of the offenses and his character. Under Indiana Appellate Rule 7(B), we may modify a sentence that we find is "inappropriate in light of the nature of the offense and the character of the offender." Making this determination "turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). Sentence modification under Rule 7(B), however, is reserved for "a rare and exceptional case." *Livingston v. State*, 113 N.E.3d 611, 612 (Ind. 2018) (per curiam).

[34] When conducting this review, we generally defer to the sentence imposed by the trial court. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). Our role is to "leaven the outliers," not to achieve what may be perceived as the "correct" result. *Id*. Thus, deference to the trial court's sentence will prevail unless the defendant persuades us the sentence is inappropriate by producing compelling evidence portraying in a positive light the nature of the offense—such as showing restraint or a lack of brutality—and the defendant's character—such as showing substantial virtuous traits or persistent examples of positive attributes. *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[35] As to the nature of the primary offense, this was a senseless killing – apparently over access to a motor scooter key. As to McKee's character, he has a lengthy history of substance abuse and failure to benefit from rehabilitative efforts afforded to him. He was intoxicated at the time of Lowe's murder. He has been adjudicated delinquent. As an adult, he has accumulated a prior felony

conviction for battery and seven misdemeanor convictions. He has previously violated the conditions of his probation. In sum, McKee has not persuaded us that, in light of the nature of the offenses and his character, that his sentence is inappropriate.

Conclusion

[36] Any instructional error was invited. The evidence is sufficient to rebut McKee's claim of self-defense and to negate sudden heat. His aggregate sentence is not inappropriate.

[37] Affirmed.

May, J., and Felix, J., concur.