MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

Yvette M. LaPlante
LaPlante LLP
Evansville, 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

Brian John Baumgartner,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

November 3, 2022

Court of Appeals Case No. 22A-CR-230

Appeal from the Warrick Circuit Court

The Honorable Greg A. Granger, Judge

Trial Court Cause No. 87C01-1905-MR-231

Bailey, Judge.

Case Summary

[1] Brian John Baumgartner ("Baumgartner") appeals his convictions for Murder, a felony;[1] Abuse of a Corpse, a Level 6 felony;[2] Obstruction of Justice, as a Level 6 felony;[3] and False Informing, as a Class B misdemeanor.[4] He also challenges his adjudication as a Habitual Offender[5] and his aggregate seventy-seven-year sentence. We affirm.

Issues

[2] Baumgartner presents six issues for review:

I. Whether Baumgartner was denied his constitutional right to present a defense when his accomplice invoked his right against self-incrimination outside the presence of the jury;

II. Whether the trial court abused its discretion in the admission of State's Exhibits 132 and 138, related to Baumgartner's cell phone records, allegedly obtained in violation of Baumgartner's right under the Fourth Amendment to the United States Constitution to be free from a warrantless search or seizure;

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[1] Ind. Code § 35-42-1-1.

[2] I.C. § 35-45-11-2(1).

[3] I.C. § 35-44.1-2-2.

[4] I.C. § 35-44.1-2-3.

[5] I.C. § 35-50-2-8.

III. Whether the trial court abused its discretion in the admission of Baumgartner's statements to police;

IV. Whether the trial court erroneously permitted amendments, as to the dates alleged, to the charges of Obstruction of Justice and False Informing;

V. Whether Baumgartner's admission to his status as a Habitual Offender is involuntary due to a lack of advisement of rights; and

VI. Whether Baumgartner's sentence is inappropriate.

Facts and Procedural History

[3] In April of 2019, Valerie Ruark ("Ruark") was living in Evansville with Michele Johnson ("Johnson"), and the women were selling methamphetamine for Thomas Hester ("Hester"). Johnson's son, Anthony Wolfe ("Wolfe"), frequently stayed at the residence and also sold methamphetamine. Baumgartner was Wolfe's former co-worker, who became Wolfe's friend and customer.

[4] Ruark was arrested on a probation violation and Wolfe was left in possession of Ruark's vehicle. Wolfe looked inside the glovebox and found probation-related paperwork signed by Ruark. As part of her probationary agreement, Ruark had promised that she would seek the prior approval of her probation officer if she planned to work as a confidential informant. Johnson and Wolfe showed the paperwork to Ruark's friend Tricia Dickerson ("Dickerson"), claiming that

Ruark had "snitch" papers. (Tr. Vol. II, pg. 80.) Dickerson and her brother opined that "they all say this," *id.* at 83, but Wolfe was not dissuaded from his suspicions. Ruark was released from jail to enter a rehabilitation program at Stepping Stone and Wolfe claimed that this was evidence that Ruark was getting special treatment.

[5] On April 20, 2019, Ruark reported to a Stepping Stone staff member that she was suffering from a toothache and needed to leave to get dental treatment. Ruark called Wolfe to come and pick her up, but he did not initially agree to do so. Ruark left Stepping Stone on foot.

[6] When Wolfe received the call Ruark had placed from Stepping Stone, Baumgartner and Baumgartner's wife, Ivory, were with Wolfe at his residence smoking methamphetamine. Wolfe and Baumgartner discussed suspicions that Ruark was an informant and "snitch" and Wolfe claimed that "there was no reason for her to be getting out." (Tr. Vol. III, pg. 182.) Wolfe showed Ivory the paperwork he had found in Ruark's vehicle and Ivory assured him that "[Ivory] had signed the same." (*Id.* at 183.) Baumgartner became agitated and claimed that "there was no way" he would sign a probation agreement with such a term. (*Id.*) Baumgartner instructed Ivory to go outside. Shortly thereafter, he told Ivory that he was leaving with Wolfe and that Ivory could use Ruark's vehicle to drive to a casino alone. The two men left together.

[7] Ivory drove to the casino, gambled, and prepared to leave. However, she discovered that the borrowed vehicle would not start. Her calls to Baumgartner

initially went unanswered; however, Baumgartner eventually returned a call and advised Ivory about using a battery pack to start the vehicle. Ivory got the vehicle started and returned home. Baumgartner presented her with a bag of clothing and a bag of hygiene items and instructed her to get rid of them.

[8] On April 26, 2019, a man hunting turtles in Warrick County discovered a female body in a burn pit. The victim had been shot in the head and her cranium had shattered into forty-eight pieces; the body had been set on fire. Despite the decomposition and desecration of the body, authorities were able to use dental records, DNA analysis, and tattoo comparisons to identify the victim as Ruark.

[9] Law enforcement authorities contacted Wolfe, who had been Ruark's last known contact. The investigation then led to Baumgartner, who initially denied knowing Ruark. Eventually, however, Baumgartner admitted that he and Wolfe had encountered Ruark walking, picked her up, and took her back to Baumgartner's pole barn or garage that they referred to as a man cave. According to Baumgartner, Wolfe had taken Ruark inside the man cave and subsequently Baumgartner heard a gunshot. He disclaimed knowledge of the disposal of Ruark's body.

[10] During the investigation, Hester contacted the police to report that Wolfe had confessed to killing Ruark. Wolfe had told Hester he shot Ruark in the face while she was lying down. Wolfe had also claimed that he had a driver. The

description of the manner of death was made prior to public release of the information that Ruark's skull had been shattered.

[11] Police officers executed search warrants at Baumgartner's property and discovered that portions of the walls inside the man cave had been freshly spray painted and some studs were not covered with drywall. When investigators looked inside the bare walls, they detected what appeared to be brain matter and blood. The officers also recovered some cardboard boxes with blood stains. When the blood was submitted for DNA testing, it was found to be consistent with DNA retrieved from Ruark's femur.

[12] On May 9, 2019, the State charged Baumgartner with Murder. Subsequently, the State alleged that Baumgartner is a habitual offender, and filed charges of Abuse of a Corpse, Obstruction of Justice, and False Informing. Baumgartner's jury trial commenced on November 2, 2021. Baumgartner was found guilty of all charges against him, and he admitted his status as a habitual offender. On January 6, 2022, the trial court imposed upon Baumgartner an aggregate sentence of seventy-seven years. This consisted of sixty-five years for Murder, enhanced by twelve years due to Baumgartner's status as a habitual offender, and concurrent sentences for Abuse of a Corpse, Obstruction of Justice, and False Informing of two and one-half years, one year, and six months, respectively. Baumgartner now appeals.

Discussion and Decision

Wolfe's Invocation of his Right Against Self-Incrimination

[13] Baumgartner contends that he was denied his right to present a defense guaranteed by the Sixth Amendment and Article 1, Section 13 of the Indiana Constitution because Wolfe was not compelled to appear before the jury to invoke his right against self-incrimination. Baumgartner argues that, because his defense was that he feared Wolfe and did not willingly assist him, the jury should have been allowed to "size up" Wolfe and determine whether or not he was a person to be feared. Appellant's Brief at 20.

[14] Prior to the defense phase of the trial, and after consultation with Wolfe's counsel, Baumgartner's counsel advised the trial court that it was "important that we get something on the record" with regard to Wolfe's anticipated invocation of his right against self-incrimination; counsel initially clarified his request with "*it doesn't necessarily have to be in front of the jury*." (Tr. Vol. III, pg. 108.) (emphasis added.) Outside the presence of the jury, Baumgartner called Wolfe as a potential witness and, as anticipated, Wolfe stated his name and invoked his right against self-incrimination. Defense counsel then addressed the trial court: "That's all the questions I have. Can't do anything with him." (*Id.* at 247.) Wolfe was released, without objection from Baumgartner.

[15] During a subsequent bench conference to address Baumgartner's decision to testify, the trial court and attorneys revisited the issue of Wolfe's testimony:

> Prosecutor: What record did you wanna [sic] make on Mr. Wolfe?

Defense Counsel: That he's pled – he showed up here, pled the fifth, was not gonna talk to us.

Prosecutor: And you wanted to do that in front of the jury?

Defense Counsel: Yeah.

Court: No, I don't think that's proper to do that.

Prosecutor: I would object to that, Judge.

Court: Yeah. I don't think you c-should do that in front of the jury.

Defense Counsel: *Alright*. …

Court: I don't think it should be done in front of the jury, no. As an accomplice.

Defense Counsel: *Okay*.

(Tr. Vol. IV, pgs. 21-22.) (emphasis added.)

[16] On appeal, Baumgartner acknowledges that it is improper for the prosecution to call a co-defendant to testify when the prosecution knows in advance that the witness will refuse to testify. He directs our attention to *Borders v. State*, 688 N.E.2d 874 (Ind. 1997); *Brown v. State*, 671 N.E.2d 401, 404-05 (Ind. 1996); *Tucker v. State*, 534 N.E.2d 1110, 1111 (Ind. 1989); and *Aubrey v. State*, 261 Ind. 692, 695-96, 310 N.E.2d 556, 559 (1974), each of which recognized that the jury could draw an inference from withheld testimony that is damaging to the

defense, and acknowledged that it is reversible error for the prosecution to knowingly call a witness simply to have the witness invoke his or her right against self-incrimination. However, Baumgartner claims that the rationale for the *Aubrey* rule – the potential for undue prejudice to the defense – is inapplicable here because a defendant has an "absolute right to confront the witnesses against him." Appellant's Brief at 18.

[17] "[I]n 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." *Martin v. State*, 179 N.E.3d 1060, 1068 (Ind. Ct. App. 2021), *trans. denied.* Also, in "particular circumstances, developed in a pretrial hearing," such as evidence of guilt of one other than the defendant, a trial court may "consider permitting a defendant to call a witness to the stand to invoke his right against self-incrimination in the presence of the jury." *Id.* at 1068-69. By the time of Baumgartner's trial, Wolfe's guilt was not in question. Wolfe had been convicted of Ruark's murder, and the State conceded that Wolfe had been the shooter. Also, Baumgartner suggested and approved the procedure employed, that is, Wolfe invoking his rights outside the presence of the jury. A failure to object accompanied by a party's affirmative requests of the court may be treated as invited error, typically precluding appellate review. *Batchelor v. State*, 119 N.E.3d 550, 556 (Ind. 2019).

[18] To the extent that Baumgartner argues he was denied a right to confront a witness against him, he is incorrect. Wolfe did not testify against Baumgartner. Identified as a potential defense witness, Wolfe initially refused to state his name, and later provided his name but indicated an unwillingness to respond to any other question that might be propounded upon direct examination. Under Indiana law, Baumgartner was not entitled to produce Wolfe before the jury solely for an observation of his demeanor; as such, Baumgartner has shown no deprivation of his right to present a defense.

Admission of Cell Phone Records

[19] Baumgartner next contends that the trial court abused its discretion when it admitted into evidence State's Exhibit 132, an AT&T record related to locations of Baumgartner's cell phone, and State's Exhibit 138, a power point presentation derived from State's Exhibit 132.

> The trial court has broad discretion to rule on the admissibility of evidence. We review its rulings "for abuse of that discretion and reverse only when admission is clearly against the logic and effect of the facts and circumstances and the error affects a party's substantial rights." … But when an appellant's challenge to such a ruling is predicated on an argument that impugns the constitutionality of the search or seizure of the evidence, it raises a question of law, and we consider that question de novo.

Guilmette v. State, 14 N.E.3d 38, 40-41 (Ind. 2014) (internal citations omitted.)

[20] Baumgartner asks that we reverse his convictions because a warrant for location tracking data pertaining to his cell phone was not admitted as an evidentiary

exhibit. He stops short of definitively claiming that police conducted a warrantless search – rather, he alternately suggests the possibility that police failed to obtain a warrant for retrieval of cell phone location data or that police obtained a warrant that lacked requisite specificity. According to Baumgartner, "without the warrant, it is impossible to tell what the warrant covered and how the State retrieved the data." Appellant's Brief at 22. He asserts that "because a warrant was required, is not of record, and [proffered exceptions] are [not] valid, the records should not have been admitted." *Id.* at 24. He observes, correctly, that in the face of a Constitutional challenge, the State has the burden to demonstrate that the measures it used to seize information or evidence were constitutional. *State v. Rager*, 883 N.E.2d 136, 139 (Ind. Ct. App. 2008). But he provides no authority for the proposition that the State must – simply as a matter of course, absent a motion to suppress or specific objection – submit into evidence any warrant whereby information was procured.[6]

[21] At trial, Baumgartner strenuously opposed the State's use of his and Wolfe's cell phone location data or call detail records.[7] But his opposition did not evolve into a motion to suppress or a specific objection referencing a

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[6] Although it is not entirely clear from the record, it appears that the trial court examined the warrant pertaining to State's Exhibit 132. Detective Kyle Tevault identified State's Exhibit 132 as "a CD with Brian Baumgartner's phone data information along with a certificate of authenticity." (Tr. Vol. II, pg. 241.) Later, when the prosecutor argued for admission of AT&T records "as a business record," the trial court requested: "Can I see the warrant for that disc?" (Tr. Vol. III, pg. 3.) The prosecutor then advised that the request for data "in the previous trial" was "titled application," apparently as opposed to a warrant. (*Id.*)

[7] Cell phone location data is different from call detail records, which Detective Toni Walden described as: "something the phone company keeps [and time stamps] of any time you make a phone call or receive a phone call." (Tr. Vol. II, pg. 113.)

warrantless search of Baumgartner's records. First, when the State moved to admit State's Exhibit 131, Wolfe's cell phone records, Baumgartner's counsel stated that he had a "need to see the warrant" and advised "I'm in possession of warrants that fall after this date." (Tr. Vol. II, pg. 238-39.) A discussion ensued as to whether Baumgartner lacked standing to challenge the admission of Wolfe's cell phone records, and ultimately Wolfe's records were admitted without a contemporaneous and specific objection from Baumgartner.[8]

[22] Thereafter, when the State proffered State's Exhibit 132, Baumgartner's records, defense counsel interjected: "since it involves my client, I certainly have standing on this one. I have some preliminary questions." (*Id.* at 242.) Defense counsel expressed concern about "a date on it that's different than the dates I have," and asked the State's sponsoring witness, Detective Kyle Tevault, if he had "a copy of your warrant that you would've asked permission for this business record." (*Id.*) Detective Tevault responded that he did not have a copy of the warrant, but he had a "response cover sheet from AT&T" showing that AT&T received a request on May 5, 2019, and sent certified records in response on May 7, 2019. (*Id.* at 243.) Defense counsel addressed Detective Tevault:

[8] To have standing to challenge a search, a defendant must establish ownership, control, possession, or interest in the premises searched. *Campos v. State*, 885 N.E.2d 590, 598 (Ind. Ct. App. 2008). The defendant must show a subjective and objective expectation of privacy in the premises. *Id.*

> I'm holding what looks to be a search warrant with some dates on it. That might – it looks to be different than what your notes show. And that's what caused me pause.

(*Id.* at 244.) Detective Tevault clarified: "It's for a different cell phone device altogether, not – this isn't the search warrant that I wrote and sent to AT&T." (*Id.* at 245.) A lengthy bench discussion then ensued, primarily concerned with whether AT&T could possess and produce location data independent of the seizure of a physical phone. The detective explained that a physical phone could be manipulated, such as to turn off location services, but A&T would have location data based upon a cell phone's interaction with cell phone towers.

[23] With those concerns apparently obviated to the extent that defense counsel did not lodge a specific objection based upon the foregoing discussion, defense counsel indicated that "there was one other issue … how did they know to get Brian Baumgartner's phone number, [be]cause isn't it true that she – Valerie's phone never called Mr. Baumgartner." (*Id.* at 250.) Detective Tevault agreed with that proposition, whereupon defense counsel lodged a hearsay objection and noted: "that's in addition to all the other warrant problems with respect to location services. I'm not confused at all. And I saw what the Court did in the last trial." (Tr. Vol. IV, pg. 2.)

[24] The trial court dismissed the jury and, again, a lengthy discussion ensued, with the attorneys and trial court in apparent agreement that, in Wolfe's trial, cell phone location data had been suppressed because of an issue with a warrant or the lack thereof. In response to continued preliminary questioning, Detective

Tevault indicated that he had obtained Baumgartner's cell phone number from an FBI agent who obtained it from records from Wolfe's cell phone.[9] Defense counsel took the position that Baumgartner's records were derivative of Wolfe's records and were "fruit of the poisonous tree," with the explanation that "they obtained Mr. Wolfe's [location data] without [a] proper warrant." (*Id.* at 7.) The prosecutor responded that Wolfe's call detail records (which included calls to Baumgartner's number) had been properly admitted after having been obtained through an investigative subpoena.[10] State's Exhibit 132 was admitted notwithstanding the defense's purported "continuing objection." (*Id.* at 14.)[11]

[25] Subsequently, the State called as a witness FBI Special Agent Nicole Robertson, the sponsoring witness for State's Exhibit 138, a power point presentation. Defense counsel indicated that he would "have some questions on whether to lodge an objection." (*Id.* at 41.) Counsel elicited responses from Agent Robertson addressing the "accuracy range" utilized by AT&T and her admission that "some of [her] data was suppressed" in "the last case in Warrick County." (*Id.* at 44.) Counsel then stated that the defense:

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[9] Wolfe's cell phone number had been obtained from Dickerson's phone.

[10] The prosecutor directed the trial court's attention to *Zanders v. State*, 118 N.E.3d 736 (Ind. 2019). In *Zanders*, the Court clarified that a cell phone subscriber has a reasonable expectation of privacy in historical cell site location information; thus, obtaining that information is a Fourth Amendment search. *Id.* at 742. However, this is distinguishable from phone records from a provider "indicating numbers dialed," which records are obtainable without a warrant. *Id.* at 745.

[11] Indiana Rule of Evidence 103(b) provides: "Once the court rules definitively on the record at trial a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

> would lodge the objection on the standpoint of accuracy and reliability. 2500 meters is an extensive distance. There wasn't a test drive done. And for those reasons and the liability reasons, I would object to the admissibility or playing the video.

(*Id.* at 45.) The prosecutor responded that such arguments went to the weight of the evidence and not its admissibility and the trial court admitted the exhibit into evidence, commenting that the jury would determine its weight.

[26] In sum, the record indicates that there were a number of defense challenges to admission of evidence related to Baumgartner's cell phone. However, Baumgartner did not make a motion to suppress on grounds of a warrantless search or seizure or a defective warrant and, as such, there is no corresponding evidentiary record. On the record before us, we have no basis upon which we can say that the State obtained any information in violation of Baumgartner's Constitutional rights. Accordingly, Baumgartner has not demonstrated that the trial court abused its discretion in the admission of evidence.

Admission of Police Statements

[27] Baumgartner made three recorded statements to police during the course of the investigation of Ruark's murder. Baumgartner objected to admission into evidence of the statements on grounds that the "interrogation style" interviews "contained half truths on both sides which could be confusing [to the jury]." (Tr. Vol. II, pg. 125.) On appeal, he argues that the statements should have been excluded in their entirety due to the potential for jury confusion, in that "it is impossible to distinguish between what evidence the officers actually have

and what evidence they are claiming to have for purposes of obtaining a confession." Appellant's Brief at 35.

[28] Indiana Evidence Rule 401 provides that evidence is relevant if:

> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

Pursuant to Evidence Rule 402, relevant evidence is generally admissible and irrelevant evidence is not admissible. According to Evidence Rule 403,

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

[29] The State responds to Baumgartner's claim of confusing or misleading the jury by observing that Baumgartner did not request redaction of portions of the statements at trial, nor does he identify on appeal specific questions or responses resulting in undue prejudice to him. Finally, the State argues that the potential for confusion was minimized by introductory questions propounded to the sponsoring witness. That is, prior to admission of the statements, Indiana State Police Detective Toni Walden testified that she had employed certain tactics during her interviews with Baumgartner. She conceded that these tactics could have included minimizing or rationalizing conduct contrary to the interviewer's perceptions, telling half-truths, or outright lying. Thus, the

jury was apprised prior to viewing the recorded statements that the State was not offering as truth the entirety of the questions, responses, or representations of the interviewer.

[30] We are persuaded, under the totality of the circumstances, that the State's direct examination of Detective Walden, together with Baumgartner's cross-examination, lessened the potential for confusion such that Baumgartner's substantial rights were not affected. *See* Indiana Appellate Rule 66(A) (providing that no error or defect in a trial court ruling is ground for reversal where its probable impact is sufficiently minor so as not to affect the substantial rights of a party). Baumgartner has demonstrated no abuse of the trial court's discretion in the admission of evidence.

Amendment of Charges

[31] Initially, the State charged Baumgartner with committing Obstruction of Justice and False Informing between April 20, 2019, and April 21, 2019. After the presentation of the State's case-in-chief, and before Baumgartner presented his defense, the State moved to amend those charges to reflect dates up to and including May 8, 2019. Over Baumgartner's objection, the trial court permitted the amendments. Baumgartner now argues that the amendments were untimely and violated his substantial rights.

[32] The charging information advises the accused of the particular offense he is charged with so that he can prepare a defense and be protected from being placed in jeopardy twice for the same offense. *Absher v. State*, 866 N.E.2d 350,

355 (Ind. Ct. App. 2007). Whether an information may be amended after the commencement of trial depends upon whether the amendment is one of form or substance. An amendment of substance is not allowed after trial has commenced, pursuant to Indiana Code Section 35-34-1-5(b), which provides:

> The indictment or information may be amended in matters of substance and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant at any time:
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> (1) up to:
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> (A) thirty (30) days if the defendant is charged with a felony; or
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> (B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors;
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> before the omnibus date; or
>
> (2) before the commencement of trial;
>
> if the amendment does not prejudice the substantial rights of the defendant. When the information or indictment is amended, it shall be signed by the prosecuting attorney or a deputy prosecuting attorney.

In turn, subsection (c) provides that: "Upon motion of the prosecuting attorney, the court may, at any time before, during, or after the trial, permit an amendment to the indictment or information in respect to any defect,

imperfection, or omission in form which does not prejudice the substantial rights of the defendant."

[33] An amendment is one of form if a defense under the original information is equally available after the amendment and the defendant's evidence applies equally to the information in either form. *Fajardo v. State*, 859 N.E.2d 1201, 1207 (Ind. 2007). An amendment is one of substance if it is essential to making a valid charge of the crime. *Id*. Whether an amendment is one of form or substance is a question of law which we review de novo. *Gibbs v. State*, 952 N.E.2d 214, 221 (Ind. Ct. App. 2011), *trans. denied*.

[34] If an amendment does not affect any particular defense or change the positions of either of the parties, then the defendant's substantial rights are not violated. *Erkins v. State*, 13 N.E.3d 400, 405 (Ind. 2014). The ultimate question is whether the defendant "had a reasonable opportunity to prepare for and defend against the charges." *Stafford v. State*, 890 N.E.2d 744, 752 (Ind. Ct. App. 2008).

[35] In opposition to the amendments, counsel for Baumgartner stated:

> Well, we absolutely prepared for the – all of the data and videos I viewed were, you know, 20th, 21st, 22nd, the witnesses and where they were and who was where, were all focused on those first dates. If we extend it out to May 8th, I perhaps may have put more evidence on about what they were doing with the van before they appeared in that *last video*. Certainly there's – we know from the videos that I've attempted to show, there's other activity going on around May 8th that probably has nothing to do with the evidence in this case. So, I think that prejudices our

> side, by us not being able to talk about the door they opened with Officer West's video of the fire burning on May 8th. Or May 7th, I'm sorry.

(Tr. Vol. IV, pg. 17.) (emphasis added.) In context, the reference to the "last video" refers to a video depicting Wolfe, Baumgartner, and Ivory near a van backed up to a firepit on Baumgartner's property. The property had been outfitted with numerous surveillance cameras. Baumgartner's defense counsel had reviewed all videos, including those up to May 8, 2019. To the extent that Baumgartner might have provided an innocent explanation for his activities near the burn pit, he was not deprived of that opportunity by the amendment of dates. His defense of fear of Wolfe remained unchanged. With respect to the False Informing charge, Baumgartner would have been aware, during the preparation of his defense, of the dates on which he spoke with police officers. Because Baumgartner was not deprived of a reasonable opportunity to prepare for and defend against the charges of Obstruction of Justice and False Informing, the amendment to those charges was one of form and was permissible.

Habitual Offender Advisements

[36] After his conviction by a jury, Baumgartner admitted he is a habitual offender. Baumgartner now asserts that his rights under *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) were violated when the trial court took his admission to his status as a habitual offender without contemporaneously informing him of the possible penalties and that he was forgoing a jury trial upon the allegation.

[37] In *Boykin*, the United States Supreme Court held that it was reversible error for the trial court to accept a guilty plea without an affirmative showing that it was intelligent and voluntary. "More particularly, *Boykin* requires that the record must show, or there must be an allegation and evidence which show, that the defendant was informed of, and waived, three specific federal constitutional rights: the privilege against compulsory self-incrimination, right to trial by jury, and the right to confront one's accusers." *Hall v. State*, 849 N.E.2d 466, 469 (Ind. 2006). *See also* Ind. Code § 35–35–1–2 (noting that the trial court shall not accept a plea of guilty without first determining that the defendant has been informed that he is waiving certain rights). *Boykin* does not require that the record of the guilty plea hearing evinces a formal advisement or formal waiver; rather, *Boykin* only requires that a conviction be vacated if the defendant did not know or was not advised at the time of his plea that he was waiving his *Boykin* rights. *Winkleman v. State*, 22 N.E.3d 844, 851 (Ind. Ct. App. 2014).

[38] Baumgartner has not cited any authority for the proposition that *Boykin* applies to habitual offender allegations as opposed to actual crimes. *Cf. Harris v. State*, 964 N.E.2d 920, 927 (Ind. Ct. App. 2012) ("It is well settled that a habitual offender finding does not constitute a separate crime, nor does it result in a separate sentence. Rather, a habitual offender finding results in a sentence enhancement imposed upon the conviction of a subsequent felony.") (citation omitted), *trans. denied*; *see also Hopkins v. State*, 889 N.E.2d 314, 317 (Ind. 2008) (observing that the issue of whether *Boykin* applies to habitual-offender proceedings was an open question not addressed by the parties in that case).

[39] The State asserts that, because Baumgartner is at bottom attempting to set aside his admission as involuntary, the proper avenue for Baumgartner to pursue is post-conviction relief. This would permit development of evidence, if any, to demonstrate that he was unaware of his *Boykin* rights. We observe, however, that *Winkleman* involved a direct appeal from a habitual offender admission. There, the Court initially observed that Winkleman had stated to the trial court that it was "not necessary" for the trial court to advise him of his rights. *Winkleman*, 22 N.E.3d at 851. The Court additionally observed that Winkleman, who had entered his plea after the guilt phase of a jury trial, had admitted to the habitual offender enhancement "'in the midst of a trial, where the *Boykin* rights are on display for all to see.'" *Id*. (quoting *Hopkins*, 889 N.E.2d at 317). The Court then concluded that Winkleman had "failed to establish on this record that he did not know he was waiving his *Boykin* rights." *Id*.

[40] Like Winkleman, Baumgartner had just received advisements as part of his jury trial before proceeding to the habitual offender phase, and Baumgartner did not establish that he was unaware of his *Boykin* rights. Based on the limited record before us, we decline to set aside the habitual offender enhancement.

Sentence

[41] Finally, Baumgartner challenges his sentence as inappropriate. Upon conviction of Murder, Baumgartner was subject to a sentence of forty-five to sixty-five years, with an advisory sentence of fifty-five years. I.C. § 35-50-2-3.

Upon conviction of each Level 6 felony, Baumgartner was subject to a sentence of six months to two and one-half years, with an advisory sentence of one year. I.C. § 35-50-2-7(b). Upon conviction of a Class B misdemeanor, Baumgartner was subject to a sentence of up to 180 days. Upon his adjudication as a habitual offender, Baumgartner was subject to an additional fixed term of between six years and twenty years. I.C. § 35-50-2-8(i). Thus, Baumgartner's maximum sentencing exposure was ninety-one years and 180 days. The trial court imposed upon Baumgartner an aggregate sentence of seventy-seven years.

[42] In selecting that sentence, the trial court found two aggravating circumstances: the brutality of the murder (with indications that it was intended to send a message to the drug community) and Baumgartner's criminal history. The trial court found no mitigating circumstances.

[43] Pursuant to Appellate Rule 7(B), 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." Because sentencing is principally a discretionary function, we reserve our authority for "exceptional cases." *Livingston v. State*, 113 N.E.3d 611, 613 (Ind. 2018). As our Supreme Court has explained, deference to the trial court "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). Ultimately, the defendant bears the burden of

persuading us that the sentence is inappropriate. *Harris v. State*, 165 N.E.3d 91, 99 (Ind. 2021).

[44] The nature of Baumgartner's offenses was that he assisted his friend and drug supplier in a brutal vendetta against a victim wrongly suspected of acting as a police informant. Baumgartner fanned the flames of the false accusation. He instructed his wife to dispose of the victim's property and hindered the investigation. On appeal, he does not address the nature of his offenses but points out that Wolfe was the actual shooter. As such, Baumgartner points to no "compelling evidence portraying in a positive light the nature of the offense." *Stephenson*, 29 N.E.3d at 122.

[45] As for the character of the offender, Baumgartner has a lengthy criminal history. He has convictions for public intoxication, disorderly conduct, operating while intoxicated, possession of methamphetamine, possession of marijuana, conversion, carrying a handgun without a license, possession of reagents or precursors with intent to manufacture methamphetamine, dealing in methamphetamine, resisting law enforcement, domestic battery, theft, unlawful possession of a syringe, and leaving the scene of an accident with bodily injury. This does not militate toward a lesser sentence than that selected by the trial court. Baumgartner has not demonstrated, in light of the nature of the offenses and his character, that his sentence is inappropriate.

Conclusion

[46] Baumgartner was not deprived of his Constitutional right to present a defense. Baumgartner has not demonstrated an abuse of the trial court's discretion in the admission of evidence. He was not deprived of the opportunity to prepare for and defend against the charges of Obstruction of Justice and False Informing. He has not shown, on the record before us, that his *Boykin* rights were violated. His sentence is not inappropriate.

[47] Affirmed.

Riley, J., and Vaidik, J. concur.