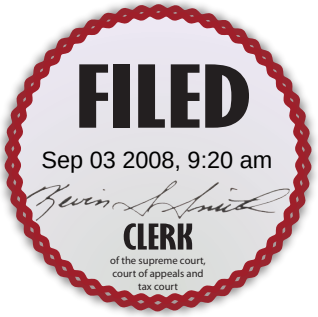

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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM HENDERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0711-CR-496
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM DEARBORN CIRCUIT COURT
The Honorable James Humphrey, Judge
Cause No.15C01-0604-MR-1

September 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, William Henderson appeals his conviction of murder and his sixty-five-year sentence, raising three issues, which we restate as four: 1) whether the admission of photographs of the victim constituted fundamental error; 2) whether the trial court abused its discretion in refusing to instruct the jury on the lesser included offense of voluntary manslaughter; 3) whether the trial court abused its discretion in finding the aggravating and mitigating circumstances; and 4) whether his sentence is inappropriate. Concluding the admission of the photographs did not amount to fundamental error, the trial court acted within its discretion in refusing to instruct the jury on voluntary manslaughter, the trial court acted within its discretion in finding the aggravating and mitigating circumstances, and the sentence is not inappropriate, we affirm.

Facts and Procedural History

Sometime during April 2005, Melissa Henderson, William's wife, began having an affair with James McCracken. About a week before her death, Melissa told William "that she wanted a divorce and that she didn't love him and that she'd found someone else." Tr. at 923. William pushed Melissa and hit her in the leg. At some point after this argument, William became suspicious that McCracken was this "someone else." On Wednesday, June 15, William sent McCracken a text message and left him three voice messages, indicating his desire to speak with McCracken. Also on Wednesday, William told Melissa that he knew of McCracken, and another physical altercation took place during which William pushed Melissa up against a wall. On Thursday, William

borrowed a truck from Paul Hizer in order to follow Melissa. William took his friend, Darin Laird, along with him on this trip.

Melissa went to work a little before midnight on Thursday, and worked until around 8:00 a.m. on Friday. She went to breakfast with some co-workers and returned home around 9:00 a.m.

William was supposed to return the truck Friday morning, but called Hizer and told him he was traveling to Kentucky to investigate potential bids on some work projects. While in Kentucky, William fainted while attempting to rent a campsite and was taken to the hospital. After being discharged from the hospital, William drove back home and returned the truck on Friday evening.

On his way back from Kentucky, William called Laird, who had previously asked William to help him move some boxes and do some work on Laird's new residence. After dropping the truck off, William picked up Laird, and the two went to William and Melissa's house. William and Laird found Melissa dead in the bedroom. It was later determined that she died of asphyxia due to strangulation.

Police recovered a broken fingernail from the scene. DNA analysis revealed the presence of the DNA belonging to William and another anonymous person. The police initially investigated McCracken and William's uncle, Leland, as possible suspects, but eventually concentrated on William as inconsistencies in his story began to appear. Specifically, William at times denied knowing of Melissa's affair, and the police discovered that William had not been in Kentucky to bid on a job, as he had told officers.

The State ordered a second autopsy, which was conducted on March 10, 2006. Dr. Dean Hawley performed this autopsy and determined that Melissa died from strangulation.

On April 26, 2006, the State charged William with murder, a felony. A jury trial began on July 30, 2007. At trial, the State introduced numerous photographs of Melissa's body as it was discovered at the murder scene, at the funeral home, and during the two autopsies. William's counsel did not object to the introduction of nearly all of these photographs. The State also introduced evidence that, after Melissa's death, William began giving his two children approximately $100 per week and asked them not to tell investigating officers about the arguments he had with Melissa before her death. William took the stand and testified that he had not killed his wife and that they had not fought the morning of her death.

At the close of evidence, William tendered instructions on the lesser-included offense of voluntary manslaughter and the definition of the term "sudden heat." The State objected, and the trial court rejected the instruction. On August 15, 2007, the jury found William guilty of murder.

On September 15, 2007, the trial court held a sentencing hearing. At this hearing, William took the stand and admitted to lying at his trial. He stated:

> I've been living with a burden for two years. I lied in Court. I'm not lying today. On June 17, 2005, I'd like to get the record straight. I did leave my house that morning at 9:30, and I did return to my house at approximately, probably 10:30 that morning – that Friday morning. Me and Melissa got into an argument and I don't know exactly what happened. The next thing I know, I came out of it, and I was lying on top of her with my arm around her. I don't know exactly what I did – but I did lie. I don't know. Actually, I don't know what I did. I can't explain it. I don't know. I just want the truth to get out. It was an accident. I never deliberately meant to do it.

Tr. at 1827. The trial court sentenced William to the statutory maximum sentence of sixty-five years. William now appeals.

Discussion and Decision

I. Admission of Photographs

A. Standard of Review

"The admission of photographic evidence is within the sound discretion of the trial court." Helsley v. State, 809 N.E.2d 292, 296 (Ind. 2004). Therefore, we will review the admission of photographs only for an abuse of discretion. Id. We will find that the trial court abused its discretion "where the decision is clearly against the logic and effect of the facts and circumstances." Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

In this case, William recognizes that he did not object to the admission of the bulk of the photographs at trial. "Failure to object to the admission of evidence at trial normally results in wavier and precludes appellate review unless its admission constitutes fundamental error." Cutter v. State, 725 N.E.2d 401, 406 (Ind. 2000). The fundamental error exception to waiver is extremely narrow. Glotzbach v. State, 783 N.E.2d 1221, 1225-26 (Ind. Ct. App. 2003). We will find fundamental error only when there has been a "'blatant violation of basic principles' that denies a defendant 'fundamental due process.'" Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003) (quoting Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987)). The "error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." Wiley v. State, 712 N.E.2d 434, 444-45 (Ind. 1999).

B. Admission of the Photographs

1. Crime Scene Photographs

The State admitted eleven photographs taken at the scene of the crime. "Photographs of a crime scene are generally admissible because they are competent and relevant aids by which a jury can orient itself to best understand the evidence presented." Underwood v. State, 535 N.E.2d 507, 516 (Ind. 1989), cert. denied, 493 U.S. 900 (1989). These photographs not only gave the jury a sense of the location of the crime, they also served to corroborate and illustrate Laird's testimony regarding the discovery of the body and the testimony of various other witnesses who described the crime scene and Melissa's injuries. See Phillips v. State, 550 N.E.2d 1290, 1299 (Ind. 1990) (noting that photographs demonstrated an officer's testimony of the appearance of the victim at the crime scene); Hoemig v. State, 522 N.E.2d 392, 399-400 (Ind. Ct. App. 1988) (concluding photographs of the crime scene were admissible and "relevant to [the police officer's] testimony," where the officer "used the photographs to help illustrate his testimony and show where the victim was located"); cf. Underwood, 535 N.E.2d at 516-17 ("[P]hotographs showing the victim in his or her natural state following death and before the body has been altered by an autopsy are relevant and admissible.").

We recognize that some of these pictures may not be pleasant to view. However, none are particularly gruesome for a murder, e.g., Robinson v. State, 693 N.E.2d 548, 553 (Ind. 1998) (admitted pictures of a body partially eaten by animals); Light v. State, 547 N.E.2d 1073, 1080 (Ind. 1989) (admitted pictures of a nude, charred, and partially decomposed body), and all are relevant to the facts and circumstances of Melissa's death,

see Perigo v. State, 541 N.E.2d 936, 939 (Ind. 1989) ("These photographs are indeed revolting, but the purpose of relevant evidence is to prove, however slightly, the material issues.").

The photographs' admissibility is not affected by either the fact that William did not dispute that Melissa was strangled to death or that other evidence established her cause of death. See Kubsch v. State, 784 N.E.2d 905, 923 (Ind. 2003) ("Photographs depicting the victim's injuries or demonstrating a witness' testimony are generally relevant therefore admissible and will not be rejected merely because they are gruesome or cumulative."); Morris v. State, 263 Ind. 370, 375, 332 N.E.2d 90, 93 (1975) ("These pictures and slides, although repetitious, were admissible for the purpose of elucidating and explaining the oral testimony of [a witness]."); cf. Perigo, 541 N.E.2d at 940 ("[A]n adversary's offer to stipulate does not bear on admissibility.").

We conclude the crime scene photographs were not inadmissible. Even if the prejudicial nature of these photographs did outweigh their probative value, we would not find that their admission rose to the level of fundamental error.

2. Funeral Home Photographs

In regard to the pictures of Melissa taken at the funeral home, we recognize the limited relevancy of these photographs. See Morris, 263 Ind. at 375, 332 N.E.2d at 93 (describing post-autopsy photographs taken at a funeral home as "irrelevant graphic portrayals" (quoting Warrenburg v. State, 260 Ind. 572, 574 298 N.E.2d 434, 436 (1974)). Still, these photographs were not completely irrelevant, as they were used to show Melissa's injuries and were referenced by crime scene investigator Ed Lewis when

he explained how he determined the cause of death and collected evidence. Even if the admission of these photographs was error, we find nothing in these photographs that renders William's trial fundamentally unfair. See id. ("[W]e feel that the oral testimony was sufficient to render the error harmless."); see also Carpenter v. State, 400 So.2d 417, 422 (Ala. Ct. App. 1981) (concluding the trial court properly admitted pictures of the victim's body at the funeral home), writ denied; Simon v. State, 324 S.E.2d 455, 456 (Ga. 1985) (concluding pictures of the victim's body at the funeral home were admissible and "relevant to the issue of identification of the victim"); People v. Adams, 224 N.E.2d 252, 255 (Ill. 1967) (finding no error in the admission of photographs of the victim's body after it was treated at the funeral home); Elmore v. Commonwealth, 520 S.W.2d 328, 332 (Ky. 1975) (finding no prejudice to the defendant in the admission of photographs of the victim's body taken at a funeral home); Williams v. State, 749 So.2d 159, 162-63 (Miss. Ct. App. 1999) (finding no error in the admission of a picture of the victim's body at the funeral home); State v. Logan, 473 P.2d 833, 840 (Mont. 1970) (finding "nothing objectionable" in the admission of three photographs of the victim's body on a slab at the funeral home); Garcia v. State, 455 S.W.2d 271, 272 (Tex. Cr. App. 1970) (finding no reversible error based on admission of photographs of victim's body taken at funeral home).

3. Autopsy Photographs

In regard to the autopsy photographs, we recognize that "autopsy photographs are generally inadmissible if they show the body in an altered condition." Allen v. State, 686 N.E.2d 760, 776 (Ind. 1997), cert. denied, 525 U.S. 1073 (1999); see also Helsley, 809

N.E.2d at 296 (recognizing that autopsy photographs are generally inadmissible after the pathologist has mutilated or altered the body); Wiley, 712 N.E.2d at 444 n.6. As our supreme court observed over twenty-five years ago, "Such a display may impute the handiwork of the physician to the accused assailant and thereby render the defendant responsible in the minds of the jurors for the cuts, incisions, and indignity of an autopsy." Loy v. State, 436 N.E.2d 1125, 1128 (Ind. 1982).

Even if these photographs were inadmissible,[1] we conclude that their erroneous admission did not rise to the "lofty standard" of fundamental error. See Wiley, 712 N.E.2d at 445; Allen, 686 N.E.2d at 776 (holding the erroneous admission of an autopsy photograph "was harmless in view of the overwhelming evidence properly admitted to prove the cause of death"); cf. Cutter, 725 N.E.2d at 406 (concluding the admission of an autopsy photograph that was "necessary to show the jury [the victim's] largely internal injury" was neither error nor fundamental error); Corbett v. State, 764 N.E.2d 622, 628 (Ind. 2002) ("We find it highly improbable that the six erroneously admitted [autopsy] photographs influenced the jury from believing the defendant's highly improbable version of events."); Custis v. State, 793 N.E.2d 1220, 1227 (Ind. Ct. App. 2003) (concluding the erroneous admission of an autopsy photograph was harmless error), trans. denied.

II. Jury Instructions

Voluntary manslaughter is a lesser-included offense to murder. Watts v. State, 885 N.E.2d 1228, 1232 (Ind. 2008). The only distinguishing element is that voluntary

[1]The State argues that the autopsy photographs were admissible because they served to illustrate the testimony of several witnesses. Because we conclude any error did not rise to the level of fundamental error, we need not decide whether the photographs were indeed admissible.

manslaughter includes the mitigating factor of sudden heat. Wilson v. State, 697 N.E.2d 466, 474 (Ind. 1998). "An instruction on voluntary manslaughter is supported if there exists evidence of sufficient provocation to induce passion that renders a reasonable person incapable of cool reflection." Dearman v. State, 743 N.E.2d 757, 760 (Ind. 2001). If "[a]ny appreciable evidence" of sudden heat exists in the record, a trial court should instruct the jury on involuntary manslaughter. Id. In rejecting William's tendered instructions relating to voluntary manslaughter, the trial court stated:

> I'm denying it based upon my review of the record and I believe it is consistent with the argument made by the State, that there is an absence of evidence to support the giving of this instruction. There is no evidence . . . of any type of dispute occurring in close proximity to the death of Ms. Henderson. Defendant's own testimony is that he did not commit this act, that there was no dispute or fight or argument that day. . . . Any evidence presented regarding any conflicts or even possibly events which would trigger sudden heat appear, from the record, to have occurred some period of days before her death.

Tr. at 1758. In situations where the trial court rejects a tendered instruction on voluntary manslaughter based on a lack of evidence of sudden heat, we review the trial court's decision for an abuse of discretion. Washington v. State, 808 N.E.2d 617, 626 (Ind. 2004).

In arguing that sufficient evidence existed to support the giving of the instructions, Henderson points to the evidence establishing that he learned of Melissa's marital infidelities roughly one week before he killed her and the evidence of his actions throughout that week – following Melissa, calling McCracken, calling McCracken's son to tell him that his father was having an affair, and participating in two physical

altercations with Melissa. We conclude this evidence is insufficient to support instructions on voluntary manslaughter.

Defendants accused of killing their cheating spouses or their spouses' partners often raise the defense of sudden heat, and we recognize that under some circumstances, "the discovery of [sexual infidelity] can support a claim of provocation." Perigo, 541 N.E.2d at 941 (Dickson, J., concurring and dissenting); see also Griffin v. State, 644 N.E.2d 561, 563 (Ind. 1994) (concluding the evidence that the victim told the defendant of her affair, told him to move his things out of their residence, pointed a gun at him, and then insisted that she and the defendant have sex supported an instruction on voluntary manslaughter), overruled on other grounds, Watts, 885 N.E.2d 1228.[2] However, the mere fact that a spouse was having an affair does not in itself constitute sufficient evidence to support an instruction on voluntary manslaughter. As our supreme court stated more than a century ago, "If upon first discovering [a wife's] infidelity [a husband] slays her, then, possibly, the killing might be reduced to manslaughter, but it is nothing less than murder, when after ample time for passion to subside, he deliberately kills her." Henning v. State, 106 Ind. 386, 401, 6 N.E. 803, 813 (1886).

We recognize that evidence indicates that William was angry that his wife was having an affair. However, "[a]nger standing alone is not sufficient to support an instruction on sudden heat." Wilson, 697 N.E.2d at 474. Instead, there must be evidence that the defendant "was in such a state of terror or rage that he was rendered incapable of

[2] In Griffin, our supreme court stated that it is not error to give an instruction on voluntary manslaughter in the absence of evidence of sudden heat, and stated that "when the question to instruct on a lesser included offense is a close one, it is prudent for the trial court to give the instruction and avoid the risk of the expense and delay involved in retrial." 644 N.E.2d at 563. Watts held that it is reversible error to instruct the jury on voluntary manslaughter when there is no evidence of sudden heat. 885 N.E.2d at 1233.

cool reflection." Dearman, 743 N.E.2d at 762. Moreover, there must be evidence that the defendant was in such a state at the time he committed the killing. See Collins v. State, 873 N.E.2d 149, 160 (Ind. Ct. App. 2007), trans. denied.

In this case, we are convinced that the record "shows a degree of deliberation and cool reflection inconsistent with sudden heat." Washington, 808 N.E.2d at 626 (concluding the trial court acted within its discretion in refusing an instruction on sudden heat where, after seeing the victim with another man, the defendant obtained a weapon, laid in wait for her, and attacked her several hours later). William learned of Melissa's affair several days before killing her. See Wilson, 697 N.E.2d at 474 (noting that the defendant saw his wife with her boyfriend several hours before the murder). He fought with her on two occasions prior to the killing, followed her, contacted the other participant in the affair, and attempted to establish an alibi. He also affirmatively testified that he did not kill Melissa and denied arguing with her on the day of her death.[3] Cf. Underwood, 535 N.E.2d at 120 (recognizing that the defendant's entire defense was inconsistent with one of sudden heat). Although the record demonstrates that William was angry about Melissa's infidelity, this evidence is insufficient to support an instruction on sudden heat. See Wilson, 697 N.E.2d at 474; Horan v. State, 682 N.E.2d 502, 507 (Ind. 1997) (concluding that where the defendant argued with the victim about his affair with the defendant's wife, and then traveled with the defendant around town drinking before beating him, leaving the scene, and then returning to continue the beating, the defendant had "ample time for 'cool reflection' between the initial argument

[3] We do not mean to imply that a defendant must choose a single defense at trial or that defenses must be entirely consistent. See Griffin, 644 N.E.2d at 563 ("The trial court is not limited to considering only one defense offered by defendant when the instruction is requested.").

and the first beating"); cf. Ford v. State, 704 N.E.2d 457, 460 (Ind. 1998) (describing evidence that husband discovered his wife's affair three days prior to the killing, took a pistol with him on the day of the killing, and shot his wife at close range "substantial . . . evidence that [husband] was not acting under the influence of sudden heat").

As William fails to point to any evidence indicating that he was acting under sudden heat when he killed Melissa, we conclude the trial court acted within its discretion in refusing to give William's tendered instructions.

III. Sentencing

In its Pronouncement of Sentence, the trial court made the following statements:

> The Court considers aggravating factors:
> 1. The Court considers the manner in which this homicide was committed to be an aggravating circumstance. In particular, the Court considers and finds that the Defendant planned to commit the murder of Melissa Henderson. The Court considers the fact that the Defendant followed and stalked the victim for a period of days prior to the murder and furthermore the Court finds that the evidence shows that the Defendant was planning an alibi the morning of the murder by lying about going to a job in Kentucky. . . . The Court also considers particularly significant and aggravating the manner of Mrs. Henderson's death which took place over a period of four (4) minutes in which her face was rammed into the mattress and significant pressure applied to her neck. This manner of strangulation would have caused her for those final minutes of her life to feel that she was drowning. . . .
> 2. The Court also considers that the factors cited above indicate that the Defendant was lying in wait for the victim. . . .
> 3. The Court also considers as an aggravating circumstance the Defendant's complete disregard for the Court and jury based on his blatant and self admitted lies to law enforcement, the jury, and to the Court. . . . The defendant has further victimized his children by lying to them and attempting to use them to his advantage. . . . The Court considers Defendant's newest testimony at the sentencing hearing to be completely unworthy of belief in that he suggests that there was an argument and that the next thing he knew he woke up with his arms around her neck and that this was an accident. The Court finds that strangling a person for four (4) minutes is not and could never be considered an accident. The Defendant is

> attempting to insult the intelligence of the Court as he did the jury by presenting this testimony. The Court considers the Defendant's series of lies upon lies to be a significant aggravating factor which indicates further dangerousness to his family and the community. A person who raises their [sic] right hand and takes an oath and who then openly commits perjury before a court and jury is a dangerous person.
>
> 4. The Court further considers as an aggravating circumstance the fact that Defendant has expressed no remorse for the killing of his wife.
>
> 5. The Court also considers the effect on his children as an aggravating circumstance. The Court finds that Defendant has shown a willingness to manipulate his children for his own benefit. . . . The Court further finds that this attempted manipulation of his own children indicates his future dangerousness to the community.
>
> 6. The Court further considers on the issue of future dangerousness the fact that the Defendant had apparently planned to kill his wife on a previous occasion upon suspicion of an affair. He was apparently talked out of the murder by another person. Testimony indicated that he was dressed in camouflage and armed.
>
> The Court also considers mitigating factors:
>
> 1. The Court considers the fact that the Defendant has no prior criminal history. . . . The Court however does not give significant weight to this mitigating circumstance [because] . . . Defendant had contemplated murdering his wife on a previous occasion and also because of his lies which indicate significant future dangerousness.
>
> 2. The Court has also considered whether Defendant acted under strong provocation, however, the Court does not find[] this to be a mitigating factor based upon the fact Defendant appears to have planned his wife's murder, planned an alibi and blatantly lied to law enforcement, to the jury and to the Court. . . . In some circumstances, an affair by victim could be considered provocation, but not under the circumstances presented in this case.
>
> 3. The Court has also considered evidence presented that the Defendant held a position of authority with his company; the Court does not consider this to be a significant mitigating factor. . . .
>
> 4. The Court . . . places no weight on [the fact that Defendant is now the only surviving parent of two (2) children] based upon Defendant's actions in attempting to have his children lie for him. . . .

Appellant's App. at 418-20. William contests the trial court's finding of these factors and the appropriateness of his sixty-five-year sentence.

A. Trial Court's Finding of Aggravating and Mitigating Circumstances

1. Standard of Review

A trial court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, a trial court is still required to issue a sentencing statement when sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh'g, 875 N.E.2d 218. "If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." Id. The trial court may abuse its discretion if it omits "reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." Id. at 490-91. We will conclude the trial court has abused its discretion if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Hollin v. State, 877 N.E.2d 462, 464 (Ind. 2007) (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)).

2. Nature of the Crime

William argues that the trial court improperly found the nature of Melissa's death to be an aggravating circumstance. Specifically, he argues this consideration was improper as "[b]y its very nature, Murder is the type of crime involving killing another person." Appellant's Br. at 32.

We recognize that circumstances that comprise the very essence of a crime cannot properly serve as aggravating circumstances. See Johnson v. State, 687 N.E.2d 345, 347 (Ind. 1997). However, "the particularized individual circumstances may be considered as a separate aggravating factor." Williams v. State, 619 N.E.2d 569, 573 (Ind. 1993); see also Ousley v. State, 807 N.E.2d 758, 760, 765 (Ind. Ct. App. 2004) (recognizing that the trial court may consider the nature and circumstances of a crime when sentencing a defendant). Here, the trial court discussed at length why it felt the nature and circumstances of William's offense were particularly egregious. As the trial court explained why it found William's offense particularly aggravating, it did not abuse its discretion in finding that nature and circumstances of the offense as an aggravating circumstance. See McElroy v. State, 865 N.E.2d 584, 590 (Ind. 2007); Vasquez v. State, 762 N.E.2d 92, 98 (Ind. 2001) ("The trial court's decision that the nature and circumstances of the crime were particularly brutal was within its discretion.").

3. Remorse

William also seems to challenge the trial court's finding that he did not express remorse, and argues that his remorse should be considered as a mitigating circumstance.

A defendant's lack of remorse can constitute an aggravating circumstance. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003). We grant trial courts broad discretion in evaluating the sincerity of a defendant's remorse. See Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). At the sentencing hearing, William clearly failed to take full responsibility for his actions and instead deflected blame. See Rogers v. State, 878 N.E.2d 269, 273 (Ind. Ct. App. 2007) (deferring to the trial court's conclusion that

the "defendant's comments [indicating his belief that his actions did not constitute murder] demonstrated a lack of remorse"), trans. denied. We conclude the trial court did not abuse its discretion in finding William's lack of remorse to be an aggravating circumstance and declining to find it as a mitigating circumstance. See Gale v. State, 882 N.E.2d 808, 819 (Ind. Ct. App. 2008).

B. Appropriateness of William's Sentence[4]

1. Standard of Review

"Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution 'authorize independent appellate review and revision of a sentence imposed by the trial court.'" Anglemyer, 868 N.E.2d at 491 (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)). When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's

[4] William makes a passing reference to the Indiana Constitution's provision stating, "The penal code shall be founded on the principles of reformation, and not of vindictive justice." Ind. Const. Art. 1, § 18. However, this section "applies only to the penal code as a whole, not to individual sentences." Henson v. State, 707 N.E.2d 792, 796 (Ind. 1999). Therefore, "particularized, individual applications are not reviewable under Article I, Section 18 because Section 18 applies to the penal code as a whole and does not protect fact-specific challenges." Ratliff v. Cohn, 693 N.E.2d 530, 542 (Ind. 1998) (emphasis in original).

character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress, 848 N.E.2d at 1080.

2. Nature of the Offense and Character of the Offender

Here, the trial court sentenced William to sixty-five years, the maximum sentence for murder. [5] Ind. Code § 35-50-2-3 (indicating that murder has an advisory sentence of fifty-five years, a minimum sentence of forty-five years, and a maximum sentence of sixty-five years). "The maximum possible sentences are generally most appropriate for the worst offenders." Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007). This rule, however, is not "a guideline to determine whether a worse offender could be imagined." Buchanan v. State, 767 N.E.2d 967, 973 (Ind. 2002).

In regard to the nature of the offense, William killed his wife and the mother of his two children. His offense has obviously caused his daughters significant emotional distress. See Bacher v. State, 686 N.E.2d 791, 801 (Ind. 1997) (holding that impact on a victim's family is a proper aggravating circumstance if the impact is more substantial than that typically associated with the offense and the defendant could foresee this impact); cf. McElroy, 865 N.E.2d at 590 (recognizing that the "trial court did not abuse

[5] Of course, murder is also punishable by death or a life sentence without parole. See Ind. Code § 35-50-2-9. However, before the trial court may impose either of these sentences, the State must prove at least one statutory aggravating circumstance and the trier of fact must find that the aggravating circumstance or circumstances outweigh any mitigating circumstances. See id. The State did not proceed against William under this statute. Therefore, although one charged with murder could face a maximum sentence of death, in regard to William, the maximum sentence was sixty-five years.

its discretion in weighing the impact upon the victims and their families as part of the nature and circumstances of the offense").

We also recognize, as did the trial court, that although all murders result in death, the brutal nature of William's killing renders his offense particularly egregious. See Spinks v. State, 437 N.E.2d 963, 968 (Ind. 1982) ("The record reflects that [the defendant] strangled the victim in a most brutal and vicious way."), disapproved of on other grounds, McCraney v. State, 447 N.E.2d 589 (Ind. 1983). This brutal nature supports a conclusion that the trial court's sentence is not inappropriate. See Hightower v. State, 422 N.E.2d 1194, 1197 (Ind. 1981) (affirming a sentence above the presumptive based on the aggravating circumstance that the crime was "particularly and exceptionally brutal in its nature"); Roney, 872 N.E.2d at 207 (noting the brutal nature of the offense in concluding a maximum sentence for murder was not inappropriate); Ousley, 807 N.E.2d at 765 (holding that a sentence for murder ten years above the presumptive was appropriate based on the circumstances under which the defendant killed his wife);

In regard to William's character, we note that despite the tremendous harm he caused to his daughters and Melissa's family and friends, the trial court found him to be utterly unremorseful. Although at the sentencing hearing he admitted to killing Melissa, he did not take responsibility for his actions, and instead claimed he did not know what happened, and denied or failed to own up to exploiting his daughters in his attempts to escape detection. See McElroy, 865 N.E.2d at 592 (affirming maximum sentence for reckless homicide and noting that although the defendant apologized to the victims, he "deflected blame" for the incident); Reyes v. State, 848 N.E.2d 1081, 1083 (Ind. 2006)

(considering the defendant's dishonest character in concluding that his sentence was not inappropriate).

William points to his service as a volunteer firefighter, testimony indicating "his good nature and willingness to help others," appellant's br. at 33, and that he cooperated with authorities during the investigation. Although we recognize that some of these factors[6] may comment favorably on William's character, an even stronger indication of his character is the nature of the offense. See McElroy, 865 N.E.2d at 592 (recognizing that the "nature and circumstances of an offense may by themselves outweigh multiple mitigating circumstances"). William not only took the life of his wife and children's mother, he took substantial steps to avoid apprehension, even instructing his daughters to lie to the police, and has yet to show remorse for his actions. These circumstances going to the nature of the offense clearly and significantly outweigh any mitigating impact of the above circumstances pointed to by William.

We recognize that William has no criminal history. By identifying the lack of criminal history as a statutory mitigating circumstance, see Ind. Code § 35-38-1-7.1(b)(6), our legislature "appropriately encourages leniency toward defendants who have not previously been through the criminal justice system." Biehl v. State, 738 N.E.2d 337, 339 (Ind. Ct. App. 2000), trans. denied. Appellate courts have often reduced sentences where a defendant has no criminal history. E.g., Sherwood v. State, 749 N.E.2d 36, 40 (Ind. 2001). However, a lack of criminal history does not inherently render inappropriate a maximum sentence for murder. See Bunch v. State, 697 N.E.2d 1255, 1258 (Ind. 1998)

[6] We seriously question whether William can be said to have "cooperated" with authorities. Although he appeared at interviews and signed a consent form allowing for a second autopsy, he repeatedly lied to police and instructed his daughters to lie to police regarding the fights he had with Melissa.

(affirming maximum sentence for murder where defendant had no criminal history); Kutscheid v. State, 592 N.E.2d 1235, 1243 (Ind. 1992) (affirming maximum sentence for murder despite defendant's lack of criminal history); cf. McElroy, 865 N.E.2d at 592 (recognizing that "lack of criminal history [does not] automatically outweigh [] any valid aggravating circumstance" (quoting McCarthy v. State, 749 N.E.2d 528, 539 (Ind. 2001))).

We also note that the trial court explained it did not give William's lack of criminal history significant weight because he had previously planned to kill Melissa. We agree that this circumstance, William's lack of remorse, and his efforts to escape detection reduce the positive effect that William's lack of criminal history has on his character. See Magers v. State, 621 N.E.2d 323, 324 (Ind. 1993) (concluding that the trial court did not err in declining to find the defendant's lack of criminal history as a mitigating circumstance where the defendant had threatened to kill people in the past and showed no remorse for his crime).

We conclude that despite William's lack of criminal history, he has failed to persuade this court that his maximum sentence for the murder of his wife is inappropriate. Cf. Cherrone v. State, 726 N.E.2d 251, 256 (Ind. 2000) (reversing maximum and consecutive sentences for murder and attempted robbery as manifestly unreasonable based on the defendant's lack of criminal history and youthful age (16), but ordering maximum concurrent sentences, noting the "severe and disturbing nature of the offense"); Thacker v. State, 709 N.E.2d 3, 9-10 (Ind. 1999) (affirming 175-year sentence for murder, conspiracy to commit murder, and burglary, all connected to a single death,

despite the defendant's lack of criminal history, where the aggravating circumstances identified by the trial court all went to the nature of the offense).

Conclusion

We conclude the admission of the photographs did not amount to fundamental error. We also conclude the trial court acted within its discretion in refusing to instruct the jury on voluntary manslaughter. Finally we conclude the trial court acted within its discretion in finding the aggravating and mitigating circumstances and that the sixty-five-year sentence is not inappropriate.

Affirmed.

BAKER, C.J., and RILEY, J., concur.