## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

Derek A. Whitt,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

December 22, 2021

Court of Appeals Case No. 21A-CR-1096

Appeal from the Marion Superior Court

The Honorable Sheila A. Carlisle, Judge

Trial Court Cause No. 49D29-1808-MR-28715

**Najam, Judge.**

## Statement of the Case

[1] Derek Whitt appeals his conviction for voluntary manslaughter. Whitt presents two issues for our review, which we expand and restate as:

1. Whether the trial court committed fundamental error when it instructed the jury on murder and voluntary manslaughter.

2. Whether the trial court committed fundamental error when it submitted to the jury a single verdict form that contained both murder and voluntary manslaughter.

3. Whether the State presented sufficient evidence of sudden heat to support Whitt's conviction.

[2] We affirm.

## Facts and Procedural History

[3] In August 2018, Whitt and Sabrina McIntosh had been in a romantic relationship for about eight months and had recently found out that McIntosh was pregnant. In the early evening, on Friday, August 24, 2018, Whitt and McIntosh went to a bar called Bar 52. The bar, which also contained a liquor store, was located in Marion County, on the corner of English Avenue and Sherman Drive. The bartender eventually asked Whitt to leave the bar because he was consuming alcohol that he had not purchased from the bar.

[4] Whitt and McIntosh left the bar without incident, went to their home, and, at some point, began to argue. To deescalate the situation, Whitt left the home and went to a friend's house. He turned his cell phone off because he did not

want to continue arguing with McIntosh. McIntosh, who did not have a valid driver's license, drove to Bar 52. Another bar patron, Breanna Presslor, was standing outside the bar when McIntosh arrived. McIntosh parked her car in a parking space that was located close to the bar's front entrance. McIntosh was crying when she approached Presslor and told Presslor that she "needed somebody to talk to." Tr. Vol. 3 at 114. The two sat in McIntosh's car and talked for a while, then proceeded into the bar.

[5] After midnight, on Saturday, August 25, David Ballinger was at Bar 52, drinking with friends and "hitting on" ladies in the bar. *Id.* at 77. The events that followed were captured on the bar's video surveillance system. Ballinger approached McIntosh and interacted with her in a way that another bar patron, Jessica Palacios, characterized as "overbearing, like any other person intoxicated is." *Id.* at 78. Ballinger told McIntosh that she was beautiful then made a comment to McIntosh "about the ring on her finger." *Id.* at 116. McIntosh felt "disrespected" by the comment, and she and Ballinger began to argue loudly. *Id.* The bartender, Samantha Reagan, heard the two arguing and "told them to stop." *Id.* at 52. Ballinger and McIntosh stopped momentarily, but "[s]tarted up a few minutes later[.]" *Id.* Reagan turned off the music that was playing in the bar, then turned the music back on when Ballinger and McIntosh stopped arguing. Ballinger eventually walked away from McIntosh. McIntosh left the bar, walked to the parking lot, and entered her car.

[6] Whitt, still at his friend's house, turned on his cell phone at around 1:08 a.m., on August 25, and, at that moment, McIntosh was calling his phone. She had

called his cell phone fourteen times between 12:31 a.m. and 1:07 a.m. Whitt called McIntosh at 1:08 a.m. and again at 1:12 a.m. McIntosh wanted Whitt to pick her up from the bar.

[7] Approximately one hour after the argument between Ballinger and McIntosh ended, Whitt arrived at the bar and parked in a parking space that was steps from the bar's front entrance. A moped was already parked in the space, but Whitt parked his car such that it was double-parked behind the moped. Whitt had brought his handgun with him. Whitt, thinking that McIntosh was inside the bar, exited his car and entered the bar. McIntosh, who was still sitting in her car, then exited her car and followed Whitt inside.

[8] Once inside the bar, Whitt and McIntosh connected, and McIntosh pointed to Ballinger, indicating that Ballinger was the individual who "disrespected" her. *Id.* at 230. Whitt, with an angry look on his face, walked over and confronted Ballinger, asking if there was a problem between him and McIntosh. The two men, who initially "were about six to seven feet apart," began to argue "face-to-face." *Id.* at 53, 118. Reagan, the bartender, testified that they were "about to fight in my bar." *Id.* at 53. Reagan intervened and told the two to take the argument outside. The bartender then pushed Ballinger toward the front entrance of the bar and then pushed Whitt toward the side entrance of the bar in an attempt to separate them. "[A]lmost half the bar['s]" patrons followed to watch. *Id.* at 68.

[9] Whitt walked out of the bar and into the parking lot. Two of Ballinger's associates were already outside, and one removed his shirt and started walking towards Whitt. Meanwhile, Ballinger walked out of the bar and into the parking lot.

[10] Whitt lunged at Ballinger and threw the first punch. Ballinger threw his drink at Whitt, and the two began to fight. McIntosh joined the fight and jumped on Ballinger's back. Individuals in the crowd grabbed Whitt's shirt and began pulling it over Whitt's head. Whitt fell to the ground and then removed his shirt. After he got up, Whitt, who is left handed, pulled his gun from his right pocket and switched the gun to his left hand. Ballinger then hit Whitt in the side of the head. After being hit, Whitt "gather[ed]" himself, and, at that same time, McIntosh leaped on Ballinger's back, and Ballinger threw McIntosh to the ground. *Id.* at 238. Whitt fired one shot, striking Ballinger in the heart, and Ballinger dropped to the ground. Whitt then walked over to Ballinger and punched him twice.

[11] Whitt then moved approximately ten feet away from Ballinger's body. Bar patrons began to administer CPR. Someone called 911. Reagan ran outside and saw Ballinger lying on the ground. Whitt yelled, "You're not breathing now are you, b[****]." *Id.* at 55. Individuals who had witnessed the incident started yelling at Whitt, "You shot him." *Id.* at 136. Whitt replied, "I don't give a f[***]. . . . I was getting jumped." *Id.*

[12] Whitt remained at the scene. When police officers arrived, Whitt was handcuffed, and an officer performed a pat-down search and found a handgun in Whitt's pocket. Whitt's demeanor was "very dazed and confused." *Id.* at 87. Whitt was arrested and taken into custody. On August 28, 2018, the State charged Whitt with murder.

### *First Trial*

[13] Whitt's first trial started on June 3, 2019. He was charged with Count I, murder, and Count II, unlawful possession of a firearm by a serious violent felon. His trial was bifurcated, and the jurors only heard evidence on the murder charge. During deliberations, the jurors were deadlocked, and the trial court declared a mistrial.

[14] The second trial was set for September 16, 2019, but was continued at Whitt's request and rescheduled for October 28, 2019. Plea negotiations failed, and five days before the second trial was set to begin, the State moved to add the charge of voluntary manslaughter as Count III. Over Whitt's objection, the motion was granted, and the trial was reset for January 27, 2020. On January 20, 2021, Whitt filed a notice of his intent to raise a claim of self-defense.

### *Second Trial*[1]

[15] Whitt was re-tried on May 24, 2021. After the presentation of evidence, and outside of the presence of the jury, the trial court, the State, and Whitt's counsel conferenced regarding final jury instructions and the verdict form, and the court raised concerns. As for the verdict form, the court asked the parties to consider how the verdict form should be drafted, since the State had charged Whitt with murder and voluntary manslaughter as separate offenses and not as an alternative, lesser-included offense, and proposed two options for the verdict form. The first option was to provide the jury with two verdict forms, one for murder and one for voluntary manslaughter. However, the court was concerned that this option might invite the jury to return guilty verdicts for both murder and voluntary manslaughter. The second option proposed by the court was to "put all of the verdicts on one sheet" with "not guilty at top, guilty of murder, or guilty of voluntary manslaughter all on the same page." Tr. Vol. 4 at 36. The State indicated that it preferred the "single verdict form" that contained all three options on the same page. *Id.* at 43. When the court asked Whitt's counsel for his preference, counsel replied, "Yes, same." *Id.*

[16] As for the jury instructions, both the State and Whitt's counsel agreed to instruct the jury on voluntary manslaughter as if it were a lesser-included

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[1] At Whitt's second trial, Count II, which was originally a charge of unlawful possession of a firearm by a serious violent felon, became the voluntary manslaughter charge. The parties agreed that the second trial would be bifurcated, with the State agreeing to forgo prosecution on the serious violent felon count upon a conviction on either the murder or voluntary manslaughter counts. *See* Tr. Vol. 4 at 90.

offense of murder, instead of a separate offense. *Id.* at 43-44. Specifically, after reviewing the proposed jury instruction, Whitt's counsel told the court that he did not "love" the wording of the jury instruction. *Id.* at 45. However, counsel did not merely object to the jury instruction as written but, ultimately, Whitt's counsel told the court, "We can keep [the instruction]." *Id.* at 46.

[17] The parties presented closing arguments to the jury. During its closing argument, the State explained that it would be receiving an instruction on sudden heat but stated that "[t]here [wa]s no sudden heat" in the case. *Id.* at 52. The State argued that the evidence proved that Whitt was guilty of murder and that his claim of self-defense did not justify his actions. The State ended its closing as follows: "[Whitt] did not – was not provoked into this. He did not act in self-defense. He murdered David Ballinger. Please find him guilty." *Id.* at 58.

[18] Following the two-day trial, the jury returned a verdict of guilty for voluntary manslaughter. The verdict form that was signed and returned to the trial court indicated that no verdict was rendered on Count I, murder, and that a verdict of guilty was rendered on Count II, voluntary manslaughter. Appellant's App. Vol. II at 116. After the verdict, the State moved to dismiss the serious violent felon count. On June 4, 2021, the trial court sentenced Whitt to twenty years executed in the Indiana Department of Correction. This appeal ensued.

## Discussion and Decision

### *Issue One: Jury Instructions*

[19] Whitt first contends that the trial court erred in instructing the jury on murder and voluntary manslaughter. He challenges final jury Instruction 27, which provides:

> The crime of Murder is defined by law as follows:
>
> A person who knowingly or intentionally kills another human being, commits Murder, a Felony.
>
> Included in the charge in this case is the crime of voluntary manslaughter, which is defined by the law as follows:
>
> A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a Level 2 Felony.
>
> Sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. The State has the burden of proving beyond a reasonable doubt that the Defendant was not acting under sudden heat.
>
> Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:
>
> 1. The Defendant, Derek Whitt
> 2. Knowingly or Intentionally
> 3. Killed
> 4. David Ballinger
> 5. And the Defendant was not acting under sudden heat

> If the State failed to prove each of these elements 1 through 4 beyond a reasonable doubt, you must find the Defendant not guilty of Murder as charged in Count I.
>
> If the State did prove each of these elements 1 through 4 beyond a reasonable doubt, but the State failed to prove beyond a reasonable doubt element 5, you may find the Defendant guilty of voluntary manslaughter, a Level 2 Felony, a lesser included offense of Count II.
>
> If the State did prove each of these elements 1 through 5 beyond a reasonable doubt, you may find the Defendant guilty of murder, a felony as charged in Count I.

*Id.* at 101-02. However, because Whitt did not object to the instruction, Whitt raises this issue as fundamental error.

[20] The doctrine of fundamental error is an extremely narrow exception to the waiver rule that requires the defendant to show the alleged error was so prejudicial to his rights as to make a fair trial impossible. *Ryan v. State*, 9 N.E.3d 663, 668 (Ind. 2014). To prove fundamental error, Whitt must show "that the trial court should have raised the issue *sua sponte* due to a blatant violation of basic and elementary principles, undeniable harm or potential for harm, and prejudice that makes a fair trial impossible." *Taylor v. State*, 86 N.E.3d 157, 162 (Ind. 2017) (quoting *Harris v. State*, 76 N.E.3d 137, 140 (Ind. 2017)), *cert. denied*, 139 S. Ct. 591 (2018). "A 'finding of fundamental error essentially means that the trial judge erred . . . by not acting when he or she should have,' even without being spurred to action by a timely objection."

*Brewington v. State*, 7 N.E.3d 946, 974 (Ind. 2014) (quoting *Whiting v. State*, 969 N.E.2d 24, 34 (Ind. 2012) (omission original to *Brewington* ), *cert denied*, 135 S. Ct. 970 (2015).

[21] However, the invited error doctrine forbids a party from taking advantage of an error that he "commits, invites, or which is the natural consequence of [his] own neglect or misconduct." *Id.* at 975. Invited error is not fundamental error and generally is not subject to appellate review. *See Cole v. State*, 28 N.E.3d 1126, 1136 (Ind. Ct. App. 2015) (quoting *Kingery v. State*, 659 N.E.2d 490, 494 (Ind. 1995)). When a defendant affirmatively states that he has "no objection" to proffered evidence, he invites any error in its admission. *Halliburton v. State*, 1 N.E.3d 670, 678-79 (Ind. 2013).

[22] Whitt did more than indicate that he had "no objection" to the allegedly erroneous jury instruction. His counsel stated explicitly, "We can keep it." Tr. Vol. 4 at 46. Thus, he invited any error on this issue.

[23] In any event, Instruction 27 was not erroneous. In *Howell v. State*, 97 N.E.3d 253 (Ind. Ct. App. 2018), *trans. denied*, where the defendant was charged with murder, among other offenses, and was convicted of voluntary manslaughter as a lesser-included offense of murder, this Court found that a final jury instruction was erroneous because it incorrectly instructed the jury that it should decide whether Howell committed voluntary manslaughter if the State failed to prove all of the elements of murder. *Id.* at 262. However, we rejected Howell's contention that the instruction resulted in fundamental error and made a fair

trial impossible because the jury had been provided with an additional instruction, Instruction 3, that correctly stated the law. Instruction 3 is identical to Instruction 27 that was provided in Whitt's case. In *Howell*, we held that

> Instruction 3 correctly informed the jury of the definitions of murder and voluntary manslaughter, that sudden heat is a mitigating factor that reduces murder to voluntary manslaughter, and that the State had the burden of proving that Howell was not acting under sudden heat, and Instruction 3 laid out specifically the circumstances under which the jury was required to find him not guilty of murder, guilty of voluntary manslaughter, or guilty of murder based on the State's success or failure to prove the required elements. Therefore, the instructions taken as a whole did not mislead the jury.

*Id.* at 263.

[24] Whitt's counsel agreed to Instruction 27, and the instruction correctly states the law. *See id.* Therefore, we hold that the trial court did not err in providing Instruction 27 to the jury.

### *Issue Two: Verdict Form*

[25] Whitt next argues that the trial court committed fundamental error when it gave the jury only one verdict form for the two separate counts of murder and voluntary manslaughter. Whitt made no objection to the verdict form at trial but seeks to avoid waiver by claiming fundamental error. *See Brewington*, 7 N.E.3d at 974 (the fundamental error doctrine is an exception to the rule that failure to object precludes consideration of the issue on appeal). However, we find that, if any error occurred, it was invited. *Wright v. State*, 828 N.E.2d 904,

907 (Ind. 2005) (the doctrine of invited error prevents a party from taking advantage of an error he "commits, invites, or which is the natural consequence of h[is] own neglect or misconduct") (internal quotation and citation omitted). Whitt invited the error when, by counsel, he agreed with the State that he "prefer[red]" the single verdict form. Tr. Vol. 4 at 43.

[26] Moreover, Whitt's verdict form is not erroneous. The form provided:

> VERDICT
>
> **NOT GUILTY**
>
> "We the Jury, find the Defendant, Derek A. Whitt, **NOT GUILTY**."
>
> * * *
>
> **MURDER: A FELONY**
>
> 'We the Jury, find the Defendant, Derek A. Whitt, GUILTY of Murder, a Felony.["]
>
> * * *
>
> **VOLUNTARY MANSLAUGHTER: LEVEL 2 FELONY**
>
> "We the Jury, find the Defendant, Derek A. Whitt, GUILTY of Voluntary Manslaughter, a Level 2 Felony.["]

Appellant's App. Vol. II at 116.

[27] Our Supreme Court has noted that the verdict instruction must be considered in conjunction with the element instruction. *Townsend v. State*, 632 N.E.2d 727, 730 (Ind. 1994). Here, the preliminary instructions informed the jury that Whitt had been charged with two separate offenses and provided the jury with the statutory language for both murder and voluntary manslaughter. And final Instruction 27 correctly stated the law. Also, the jury was instructed that it was the judge of the law and the facts – the appropriate instruction given for informing the jury of its power under Article 1, Section 19 of the Indiana Constitution.[2] *See* Appellant's App. Vol. II at 74.

[28] To the extent Whitt relies on *Womack v. State*, 738 N.E.2d 320 (Ind. Ct. App. 2000), *trans. denied*, in support of his argument, we do not find *Womack* instructive. Here, unlike in *Womack*, the verdict form gave the jury the option to find Whitt not guilty of the charged offenses. Instruction 27 specified the elements of the crimes upon which the State bore the burden of proof and upon which a guilty verdict was required to rest. And Whitt's verdict form did not mandate a conviction. There is no error regarding Whitt's single verdict form. Therefore, we hold that no error occurred when the trial court submitted Whitt's verdict form to the jury.

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[2] Article 1, Section 19 of the Indiana Constitution provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

### *Issue Three: Sufficiency of the Evidence*

[29] Finally, Whitt argues that there was insufficient evidence presented at trial that he acted under sudden heat to sustain his conviction for voluntary manslaughter. Whitt maintains that there was "no evidence that [he] had an excited state of mind which obscured his ability to reason, or that he was incapable of rational thought when he shot [Ballinger]." Appellant's Br. at 22.

[30] When considering the sufficiency of evidence, "a reviewing court does not reweigh the evidence or judge the credibility of the witnesses." *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005). We must affirm "if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt." *Id.* (internal citation omitted).

[31] Voluntary manslaughter is an inherently included lesser offense of murder, distinguished from murder by the presence of sudden heat. *Wilson v. State*, 697 N.E.2d 466, 474 (Ind. 1998). A person commits voluntary manslaughter when he knowingly kills another human being "while acting under sudden heat." Ind. Code § 35-42-1-3(a). For sudden heat to occur, there must be "sufficient provocation to engender . . . passion which is demonstrated by anger, rage, sudden resentment, or terror that is sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." *Jackson v. State*, 709 N.E.2d 326, 328 (Ind. 1999). "Sudden heat excludes malice, and neither mere words nor anger, without more, provide sufficient provocation." *Conner v. State*, 829 N.E.2d 21,

24 (Ind. 2005). Evidence of sudden heat may be found in either the State's case-in-chief or the defendant's case. *Brantley v. State*, 91 N.E.3d 566, 572 (Ind. 2018) (citing *Jackson*, 709 N.E.2d at 328), *cert. denied*, 139 S. Ct. 839 (2019). The question of whether the evidence presented constitutes sudden heat sufficient to warrant a conviction for voluntary manslaughter instead of murder is for the jury to determine. *Id.*

[32] Contrary to Whitt's claims that there was no evidence of sudden heat, he himself testified that he "thought [he] was going to get jumped" when he saw one of Ballinger's associates remove his shirt, that he "fe[lt] like [he was] going to be threatened," and that "the energy was just bad." Tr. Vol. 3 at 233, 234. He also testified that "Ballinger and his associates were coming towards me, so I reacted first. . . . And then the next thing I know, I'm getting swarmed by a lot of people." *Id.* at 234. Whitt testified that he believed he was in danger, that he was "scared[,]" and that he thought someone else in the group had a gun. *Id.* at 236, 237. Whitt told the jury that after he pulled out his gun, Ballinger hit him, and "at that moment," Whitt "[gathered himself,]" looked up, saw his girlfriend (who was slight of frame and pregnant) "being slammed to the ground," and "at that moment, that's when [he] fired [his] weapon." *Id.* at 238. Whitt testified that he punched Ballinger after he shot him because he "didn't know if [Ballinger] was still going to be in a position to attack [him], or anybody else . . . for that matter." *Id.* at 239. When asked on cross-examination if he was aiming at Ballinger when he fired his weapon, Whitt replied, "It was more of a reaction." Tr. Vol. 4 at 4.

[33] There was also evidence indicating that Whitt was provoked by anger, rage, or resentment. Reagan, the bartender, testified that after Whitt shot Ballinger, Whitt was yelling, "You're not breathing now are you, b[****,]" and that Whitt looked "[h]yped up" and "[a]ngry." Tr. Vol. 3 at 55-56. Brittani Simms, a bar patron, testified that after the shooting, individuals who had witnessed the incident started yelling at Whitt, "You shot him." *Id.* at 136. And Whitt replied, "I don't give a f[***]. . . . I was getting jumped." *Id.* Thus, ample evidence was presented that Whitt acted out of anger, terror, or a combination thereof to support his conviction for voluntary manslaughter.

[34] Whitt also argues that his conviction for voluntary manslaughter cannot stand because, according to Whitt, the prosecutor "unequivocally and repeatedly conceded there was no sudden heat." Appellant's Br. at 23. During her opening statement, the prosecutor told the jury, "[W]e will ask you to find [Whitt] guilty of murder." Tr. Vol. 3 at 45. During her closing argument, the prosecutor stated that "[t]here is no sudden heat[,]" and Whitt "was not provoked into this." Tr. Vol. 4 at 52, 58. Whitt maintains that the prosecutor's statements "were unequivocal admissions of fact" that amounted to binding judicial admissions. Appellant's Br. at 23. We cannot agree and conclude that the prosecutor's statements cannot be regarded as judicial admissions.

[35] Judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring at any point in a judicial proceeding. *Stewart v. Alunday*, 53 N.E.3d 562, 568 (Ind. Ct. App. 2016). A judicial admission "is conclusive upon the party making it and relieves the opposing party of the duty

to present evidence on that issue." *Weinberger v. Boyer*, 956 N.E.2d 1095, 1105 (Ind. Ct. App. 2011), *trans. denied*. An attorney's remarks during opening statement or closing argument may constitute judicial admissions that are binding on the client. *Saylor v. State*, 55 N.E.3d 354, 363 (Ind. Ct. App. 2016), *trans. denied*.

[36] To qualify as a judicial admission, an attorney's remarks must be a "clear and unequivocal admission of fact." *Parker v. State*, 676 N.E.2d 1083, 1086 (Ind. Ct. App. 1997). Stated differently, the attorney's remarks "must be an intentional act of waiver[,] not merely assertion or concession made for some independent purpose." *Collins v. State*, 174 Ind. App. 116, 120-21, 366 N.E.2d 229, 232 (1977). Where there is ambiguity or doubt in a statement, it is presumed that the attorney did not intend to make an admission. *Lystarczyk v. Smits*, 435 N.E.2d 1011, 1014 (Ind. Ct. App. 1982).

[37] Whitt admitted that he killed Ballinger but presented evidence that he shot and killed him in self-defense. The State alleged that Whitt murdered Ballinger, and, in the alternative, that Whitt killed Ballinger while acting under sudden heat. Usually, an opening statement is used to acquaint the judge and jury with the facts that counsel intends to prove; it is not substantive evidence. *Id.* During final argument, it is proper for counsel to argue both law and facts. *Inman v. State*, 271 Ind. 491, 493, 393 N.E.2d 767, 769 (1979). And an attorney may properly argue for any position or conclusion based on her analysis of the evidence. *Flynn v. State*, 177 Ind. App. 360, 363, 379 N.E.2d 548, 550 (1978).

[38] Here, the statements in question were not judicial admissions. Instead, they constituted comments by the prosecutor that were presented to suggest a conclusion that the jury might draw that was consistent with the theory that Whitt was guilty of murder and did not act under sudden heat. Also, "[i]t is axiomatic that the arguments of counsel are not evidence." *Blunt-Keene v. State*, 708 N.E.2d 17, 19 (Ind. 1999). And, here, the jury was instructed that the attorneys' opening statements and closing arguments "[we]re not evidence." Appellant's App. Vol. II at 89, 103. Sufficient evidence of sudden heat was presented to support Whitt's conviction of voluntary manslaughter.

## *Conclusion*

[39] In sum, there is no error in Whitt's final Instruction 27 or his verdict form, and even if there were, Whitt invited the error, and invited error is not fundamental error. There was sufficient evidence of Whitt acting under sudden heat to sustain his conviction for voluntary manslaughter. We therefore affirm the trial court.

[40] Affirmed.

Vaidik, J., and Weissmann, J., concur.