MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Valerie K. Boots
Megan E. Shipley
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

J.T. Whitehead
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Antonio Lowery,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 13, 2023

Court of Appeals Case No.
23A-CR-159

Appeal from the
Marion Superior Court

The Honorable
Shatrese M. Flowers, Judge

Trial Court Cause No.
49D28-2011-MR-33875

Memorandum Decision by Senior Judge Baker
Judges Riley and May concur.

Baker, Senior Judge.

Statement of the Case

[1] Antonio Lowery unloaded fifteen rounds from his Springfield XD 40 caliber handgun into the body of the grandmother of his unborn child, fatally wounding her. He appeals from his conviction of murder,[1] challenging the trial court's decision not to give an instruction on voluntary manslaughter, and arguing that his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] Marcaysha Pierson dated Lowery for about three years and lived with him off and on from 2018 to 2020. Pierson became pregnant with Lowery's child. By the end of October 2020, Pierson and Lowery were no longer dating, but communicated with each other because of Pierson's pregnancy.

[3] On October 31, 2020, Pierson, who by that time was seven months pregnant, and her mother, Deanna Sibley, were moving some belongings to another apartment. Lowery argued with Pierson earlier in the day about things she had posted on Facebook, but later agreed to help Sibley and Pierson move after Sibley offered to pay him one hundred dollars for his assistance. Lowery laughed with Sibley when they were downstairs at the apartment building.

---

[1] Ind. Code §35-42-1-1 (2018).

[4] Later, Pierson and Sibley, who had rented a U-Haul truck, met Lowery, who was driving his white Chevrolet Malibu, at a gas station. Sibley bought drinks and snacks for them all. However, Lowery resumed arguing with Pierson about her Facebook posts. Pierson, who was seated in the truck, responded by rolling up the window and ignoring him. Lowery drove away in his Malibu.

[5] Sibley and Pierson drove to their new apartment to unload the U-Haul and arrived there sometime between 11:00 p.m. and 12:00 a.m. Sibley parked the U-Haul in front of the building and in the middle of the parking lot. There was no one else around when the two women began unloading the truck and taking things to the new apartment. Lowery arrived shortly thereafter and asked Pierson about a pair of his shoes that were among the things they had moved. As the two went upstairs to retrieve the shoes, Lowery continued arguing to Pierson, but she ignored him. At one point as they descended the stairs, Lowery said "[h]e would kill [her]" and "I'll do this to you right now, watch, watch," but Pierson continued to ignore him. Tr. Vol. II, p. 173.

[6] Once in the parking lot, Lowery continued to loudly argue with Pierson. Sibley told the two that they needed to be quiet. Lowery claimed that Pierson "was talking shit . . . she was talking about my mama." State's Ex. 107 (20:25-21:00). Pierson called Lowery's mother to ask if she could come talk with her son, because she believed Lowery would only listen to his mother. When Lowery's mother called him, he turned off his cell phone. Sibley told Lowery to go home, and Lowery began to walk away.

[7] Lowery turned around and asked for the one hundred dollars the women were going to pay him for helping them move. Sibley told Lowery that she did not have any money for him because "he didn't even do nothing[sic]." *Id.* at 176. And, in any event, she said that she did not have the full one hundred dollars with her then. Pierson agreed to give him fifty dollars of her own, but Lowery refused to take the money.

[8] Sibley told Lowery to go home, and as he began walking away, he continued "saying slick stuff." *Id.* at 174. Pierson called Lowery a crackhead, and Lowery began shooting his gun. Sibley told Pierson to run and she did, finding a hiding place underneath a red pickup truck parked in the lot. Sibley also told Lowery to stop firing the gun, but he continued anyway. Pierson heard her mother say, "no, don't Tony," and "Caysha, run." *Id.*

[9] When Pierson heard the tires of Lowery's car screeching as he drove from the apartment complex, she waited and then looked for her mother. She believed that her mother had also run away from Lowery, but discovered her mother's lifeless body lying on the ground by the driver's side door of the U-Haul.

[10] Pierson called 911 and was removed from the crime scene after the police arrived at around 3:45 a.m. Officers then secured the scene and searched for shell casings. IMPD Detective James Hurt, who was assigned to the homicide division, spoke with Pierson and learned Lowery's address. Another detective conducted surveillance of Lowery's apartment and executed a traffic stop of a vehicle in which he was a passenger.

[11] Officers obtained a search warrant for Lowery's apartment and, in executing the warrant, discovered in his closet the weapon Lowery used to murder Sibley—a semi-automatic Springfield XD 40 caliber handgun. Detective Hurt interviewed Lowery who admitted he fired the weapon until it was empty. A ballistics examination of the shell casings, bullet and bullet fragments, and the weapon itself confirmed Lowery's confession that he used the weapon to kill Sibley.

[12] Sibley's autopsy revealed that Lowery shot Sibley in the right shoulder, head, spine, back, kidney, left and right hip, hand, torso, pelvis, femur, chest, lung, spinal cord, breasts, intestines, and buttocks. Sibley suffered fifteen gunshot wounds. Her cause of death was multiple gunshot wounds, and her manner of death was homicide.

[13] The State charged Lowery with murder. During his jury trial, Lowery requested, but did not tender, a jury instruction on voluntary manslaughter. The trial court denied the request for a reckless homicide instruction without argument, but did entertain arguments about whether a jury instruction on voluntary manslaughter and sudden heat was appropriate. The trial court denied Lowery's request, concluding that the anger and words did not establish sudden heat sufficient to warrant the instruction. The jury found Lowery guilty as charged, and the trial court sentenced him to fifty-five years executed in the Indiana Department of Correction. This appeal ensued.

Discussion and Decision

I. Allegation of Instructional Error

[14] Lowery argues that the trial court abused its discretion in instructing the jury. Lowery requested, but did not tender, an instruction on voluntary manslaughter, which the trial court denied.

[15] When the asserted error is declining to give an instruction, '"a tendered instruction is necessary to preserve error because, without the substance of an instruction upon which to rule, the trial court has not been given a reasonable opportunity to consider and implement the request."' *Mitchell v. State*, 742 N.E.2d 953, 955 (Ind. 2001) (quoting *Scisney v. State*, 701 N.E.2d 847, 848 n.3 (Ind.1998)) (distinguishing between not giving an instruction and giving an erroneous one). Failure to tender an instruction generally results in waiver of the issue for review. *Ortiz v. State*, 766 N.E.2d 370, 375 (Ind. 2002).

[16] However, appellate courts have held that the purpose of the waiver rule is not served by applying it in cases where the record is sufficiently clear that the trial court had a "reasonable opportunity to consider and implement [the] request for the instruction." *Garrett v. State*, 964 N.E.2d 855, 857 (Ind. Ct. App. 2012), *trans. denied*; *and see McDowell v. State*, 885 N.E2d 1260, 1262 (Ind. 2008) (no waiver where Court had benefit of colloquy between trial court and counsel). The State concedes that the issue is available for review here.

[17] Instructing the jury lies solely within the discretion of the trial court, and we review the trial court's refusal to give a tendered instruction for an abuse of that

discretion. *Schmid v. State*, 804 N.E.2d 174, 182 (Ind .Ct. App. 2004), *trans. denied*; *McCarthy v. State*, 751 N.E .2d 753, 755 (Ind. Ct. App. 2001), *trans. denied.* Jury instructions are to be considered as a whole, and we will not find that the trial court abused its discretion unless we determine that the instructions taken as a whole misstate the law or otherwise mislead the jury. *Henderson v. State*, 795 N.E.2d 473, 477 (Ind. Ct. App. 2003), *trans. denied.* Instructional errors are harmless where a conviction is clearly sustained by the evidence, and the instruction would not likely have impacted the jury's verdict. *Randolph v. State*, 802 N.E.2d 1008, 1013 (Ind. Ct. App. 2004), *trans. denied*. That is, before a defendant is entitled to a reversal, he must affirmatively demonstrate that the instructional error prejudiced his substantial rights. *Schmid*, 804 N.E.2d at 182.

[18] In determining whether the trial court properly refused a tendered instruction, we consider three factors: (1) whether the tendered instruction correctly stated the law; (2) whether there was evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction was covered by other instructions. *Id.* Here, in the absence of a tendered instruction, we focus on the second factor—whether there was evidence of sudden heat in the record to support the giving of a voluntary manslaughter instruction.

[19] "An instruction on voluntary manslaughter is warranted if the evidence demonstrates a serious evidentiary dispute regarding the mitigating factor of sudden heat; that is, there must be evidence showing sufficient provocation to

induce passion that renders a reasonable person incapable of cool reflection." *Massey v. State*, 955 N.E.2d 247, 256 (Ind. Ct. App. 2011). "'Sudden heat' is characterized as anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary person, preventing deliberation and premeditation, excluding malice, and rendering a person incapable of cool reflection." *Suprenant v. State*, 925 N.E.2d 1280, 1282 (Ind. Ct. App. 2010), *trans. denied*. "Anger alone is not sufficient to support an instruction on sudden heat." *Id.* "Nor will words alone 'constitute sufficient provocation to warrant a jury instruction on voluntary manslaughter,' and this is 'especially true' when the words at issue are not intentionally designed to provoke the defendant, such as fighting words." *Id.* (quoting *Allen v. State*, 716 N.E.2d 449, 452 (Ind. 1999)).

[20] "In addition to the requirement of something more than mere words, the provocation must be sufficient to obscure the reason of an ordinary man, an objective as opposed to subjective standard." *Id.* (internal quotations omitted). "Finally, Voluntary Manslaughter involves an 'impetus to kill' which arises 'suddenly.'" *Id.* (quoting *Stevens v. State*, 691 N.E.2d 412, 427 (Ind. 1997)).

[21] Lowery lists the following items in support of his argument that a voluntary manslaughter instruction should have been given; namely, (1) the things Pierson posted on Facebook; (2) Pierson's insults—about Lowery ("crackhead') and his mother; and (3) Sibley's refusal to pay Lowery for helping them move. There is no dispute that Lowery was angry with Sibley and Pierson. Lowery told Detective Hunt that he and Pierson had been arguing about things Pierson posted on Facebook, and then about money. He told the officer that "things

just went left and he became upset and he just started shooting," and that he "[got] angry for no reason[.]" Tr. Vol. III, pp. 4, 16. Pierson's testimony also established that they had argued by text message and in person for a large part of the day about Pierson's Facebook post. And Pierson insulted Lowery by calling him a "crackhead" while they argued about money. Tr. Vol. II, p. 174.

[22] However, words alone are not sufficient provocation to warrant an instruction on voluntary manslaughter. *See Massey*, 955 N.E.2d at 256. And this is certainly true when the words used were not fighting words designed to provoke violence. *Id.* Calling someone a crackhead, while unkind and insulting, does not constitute fighting words. On the other hand, when Lowery told Pierson he would kill her, additionally saying, "I'll do this to you right now, watch, watch," Tr. Vol. II, p. 173, those were fighting words. The language Pierson used in comparison with Lowery's choice of words illustrates that her word choice was not provocative, but rather, insulting. And "insults and taunts alone are not sufficiently provocative to merit a conviction for voluntary manslaughter instead of murder." *Watts v. State*, 885 N.E.2d 1228, 1233 (Ind. 2008).

[23] Additionally, Sibley's failure to pay Lowery and the verbal argument about this that ensued is not enough. Unlike the cases Lowery cites, the argument never turned into a physical confrontation. Nor did Sibley or Pierson ever threaten him with physical violence. They offered to pay a portion of the money promised in order to get him to leave. He responded by threatening them. Therefore, this case is distinguishable from both *Collins v. State*, 966 N.E.2d 96

(Ind. Ct. App. 2012) (verbal argument over money turns into a physical assault) and *Wheeler v. State*, 482 N.E.2d 1141 (Ind. 1985) (verbal argument over money leads to threatened violence with a baseball bat).

[24] The evidence reflects that Lowery spent several hours with Sibley and Pierson and was angry about things Pierson posted on Facebook for most of the day. Lowery left at one point after meeting the women at the gas station. Upon his return, he argued with Pierson some more about the things she posted on Facebook, and then about money. Next, he stated his intent to shoot Pierson, and then he began shooting at the two, fatally wounding Sibley, instead of leaving in his car as he had done before. Therefore, there was no serious evidentiary dispute before the jury warranting an instruction on voluntary manslaughter. The trial court did not abuse its discretion by refusing to instruct the jury about voluntary manslaughter.

II. Inappropriate Sentence

[25] Lowery argues that his sentence is inappropriate in light of the nature of the offense and his character. He seeks a downward revision of his sentence to forty-five years. *See* Appellant's Br. p. 29. We cannot agree.

[26] Pursuant to Ind. Appellate Rule 7(B), we may revise a sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Our principal role in Appellate Rule 7(B) review is to leaven the outliers rather than necessarily achieve what is perceived as the correct result in each case. *Turkette v. State*, 151 N.E.3d 782, 786 (Ind. Ct. App. 2020), *trans.*

denied. Appellate Rule 7(B) analysis does not determine whether another sentence is more appropriate but rather whether the sentence imposed is inappropriate. *Conley v. State*, 972 N.E.2d 864, 876 (Ind. 2012). The defendant has the burden of persuading us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

[27] 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). When assessing the nature of the offense and character of the offender, we may consider "any factors appearing in the record." *Turkette*, 151 N.E.3d at 786. Ultimately, whether a sentence should be deemed inappropriate turns on the culpability of the defendant, the severity of the crime, the damage done to others, and a myriad of other factors that come to light in a given case. *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008).

[28] In determining whether a sentence is inappropriate, the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. *Brown v. State*, 160 N.E.3d 205, 220 (Ind. Ct. App. 2020). The sentencing range for murder is a term of imprisonment from forty-five to sixty-five years, with the advisory sentence being fifty-five years. Ind. Code § 35-50-2-3(2015). Lowery received the advisory sentence.

[29] When reviewing the nature of the offense, we look to the details and circumstances of the offense and the defendant's participation therein. *Madden v. State*, 162 N.E.3d 549, 564 (Ind. Ct. App. 2021). Here, Lowery shot Sibley fifteen times. He announced his intention to fire the weapon first when talking with Pierson, and then proceeded to fire it at both Pierson and Sibley, the mother and grandmother of his then-unborn child.

[30] Sibley was helping her daughter move when she was murdered after Lowery's disagreement with Pierson over a Facebook post and money. He was offered a partial payment, but rejected it before fatally shooting Sibley. Pierson, who was seven months pregnant at the time, was forced to hide under a truck on her stomach while listening to her mother beg Lowery to stop shooting. We conclude that as for the nature of the offense, Lowery has not persuaded us that a downward revision is warranted.

[31] Turning to Lowery's character, the facts mentioned above also reveal much about his character. However, Lowery directs us to the facts that he was nineteen years old, employed full-time, and had "no juvenile history and no criminal history prior to the present case." Appellant's Br. p. 28. Although that is true, the record also reflects that despite having no prior adjudications or criminal history, Lowery regularly consumed marijuana, which is illegal, and drank alcohol before he was legally able to do so. And Lowery was found guilty of major assault on another inmate while in custody in Marion County. Thus, Lowery has not fully abided by the law as he suggests. We are unpersuaded that a downward revision is warranted based on his character.

[32] We conclude that Lowery's sentence is not inappropriate in light of the nature of the offense and his character.

Conclusion

[33] In light of the foregoing, we affirm the trial court's judgment.

[34] Affirmed.

Riley, J., and May, J., concur.