

Appellant/Defendant Scott Malott appeals following his convictions for Murder¹ and Class B felony Confinement.² Malott contends that the trial court abused its discretion in admitting certain autopsy photographs of the victim and that the evidence presented at trial was insufficient to support his murder conviction. Malott also contends that his aggregate seventy-year sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

Heather Rush was married to Stanley Turlo from 1998 to 2004. During the course of their marriage, Heather and Turlo had two children. Shortly after her marriage to Turlo ended, Heather entered into a relationship with Malott. During the course of their relationship, Heather and Malott also had two children. In 2007, Heather met John Rush, moved out of the home she shared with Malott, and married Rush.

At some point during the latter part of 2008, Heather met Roger Lyman through a mutual acquaintance. At the time, Heather was married to Rush. Heather and Rush separated, however, some time around Christmas of 2008. At this time, Rush moved out of the home he shared with Heather and moved to Nebraska, taking all of the money in Heather's bank account with him. After Rush moved out, Heather and Lyman began dating. Heather and Lyman dated from shortly after the time that Rush moved out until March 9, 2009.

After Rush moved out, Heather could no longer afford the house that she rented in

¹ Ind. Code § 35-42-1-1 (2008).

² Ind. Code § 35-42-3-3 (2008).

Colfax. Heather tried to find a roommate or a cheaper housing alternative, but was unsuccessful. Malott offered to allow Heather and the children to move into his house in New Richmond. Malott and Heather were not planning to rekindle their romantic relationship, but rather to live together as friends and co-parents. Malott benefited from this arrangement because he got the opportunity to spend more time with his children, and Heather benefited from the arrangement because she was only expected to pay \$300 per month in rent. According to their arrangement, Malott was going to stay in a bedroom on the west side of the house, Heather would stay in a bedroom on the east side of the house, and the children would stay in two bedrooms in the middle.

Lyman helped Heather move into Malott's home on Friday, March 6, 2009. Later that evening, Malott, Heather, Lyman, and the children had a cookout at Malott's home. At some point, Malott left to go to work. Lyman stayed overnight with Heather in her bedroom. On Saturday, March 7, 2009, Heather and Lyman spent the day cleaning and painting Heather's house in Colfax. Heather and Lyman stayed in Heather's house in Colfax that evening. On Sunday, March 8, Heather and Lyman went for a motorcycle ride, ran a few errands, and packed Heather's remaining possessions, including her computer, into her vehicle. About 9:30 that evening, Heather and Lyman returned to Malott's home in New Richmond. The children were already in bed when Heather and Lyman arrived. Lyman helped Heather unload her vehicle and stayed to help her set up her computer.

After Lyman finished setting up Heather's computer, Lyman, Heather, and Malott sat in Heather's bedroom and watched television and talked. As Lyman prepared to leave,

Heather asked him to stay with her overnight. Lyman agreed to stay and fell asleep, fully dressed, on top of the bed's covers. At some point during the evening, Lyman took off all of his clothing, except for his underwear, and got under the covers of the bed. At this point, Heather was sleeping, fully dressed in a sweatshirt and a pair of pants, under the covers beside Lyman.

During the night, Lyman and Heather were awakened when Malott entered Heather's bedroom and turned on the light. Malott was angry and was holding a gun and a roll of duct tape. Lyman heard Malott load the gun. Malott threw the roll of duct tape at Heather and instructed her to "tape [Lyman] up." Trial Tr. p. 59. Heather refused. Lyman pointed the gun at Lyman and told Lyman that "[he] better not be naked under there or [Malott] was going to shoot [him] in [his] head." Trial Tr. p. 59. Malott began threatening Heather and told her to "shut up" because "it was his turn to talk." Trial Tr. p. 60. Malott told Heather that she was not going to take the kids away like she did when she married Rush, that he was going to file for bankruptcy, and that the situation was Lyman's fault. Malott also accused Heather of manipulating both him and Lyman for her own personal benefit. Malott talked for a period of approximately three or four hours during which he continued to hold the gun in his right hand. Malott eventually calmed down. While Malott was talking to Heather, Lyman put on his clothing. Lyman noticed a box of nine millimeter shells on top of the entertainment center and that Malott had an extra clip for the gun.

At some point, Malott wanted "to know where [Lyman's and Heather's] cell phones were at." Trial Tr. p. 65. Malott and Heather began arguing, and Malott struck Heather in

the face, causing her to suffer a black eye, bloodied nose, and fattened lip. Heather became physically ill. When Heather needed to use the bathroom, Malott made both Heather and Lyman walk to the bathroom at gunpoint, where Malott and Lyman waited while Heather used the facilities. After striking Heather, Malott twice stated that he would kill himself and put the gun in his mouth. Both times, Lyman talked to Malott and got him to calm down by telling him that “his kids loved him and he had a lot going for him and it wasn’t that big of a deal it’s not the end of the world it’s a battery charge.” Trial Tr. p. 68.

Toward the end of the three to four hour period, Malott had calmed down “a lot.” Trial Tr. p. 70. He allowed Lyman to go out to Heather’s car to get his cigarettes. Lyman returned to the house and went in the bathroom to smoke a few cigarettes. Lyman tried to convince Malott to allow Lyman and Heather to leave. At approximately 4:45 a.m., Malott, who appeared to have calmed down even more, allowed Heather to get ready to leave. Lyman went back into the bathroom to smoke another cigarette before he and Heather left.

While Lyman was in the bathroom smoking the cigarette, Heather and Malott began arguing about whether Malott would allow Heather to take her cell phone with her when she and Lyman left. Lyman heard a gunshot as he walked out of the bathroom. Lyman walked into the bedroom and saw Heather “holding her belly.” Trial Tr. p. 74. Lyman watched as Malott shot Heather in the right shoulder and then again in the back of the head. Afterward, Lyman saw Heather lying face-down on the floor. Lyman went back into the bathroom and escaped through the bathroom window.

Lyman got into Heather’s car and drove off to find help. Lyman stopped a passing car

and asked for assistance before driving to a neighbor's home. While at a neighbor's home, Lyman saw Malott drive away. Lyman returned to Malott's home, rolled Heather onto her back, and called 911. Lyman told the 911 operator that Heather was not breathing and he did not feel a pulse. It was later determined that Heather had died as a result of her injuries. Throughout the ordeal, both Heather and Lyman had wished to leave, but Malott would not permit them to do so.

On March 10, 2009, the State charged Malott with murder and two counts of Class B felony confinement. On August 5, 2009, the State filed a motion seeking an additional penalty for commission of the charged offenses using a handgun pursuant to Indiana Code section 35-50-2-11 (2009). On April 21, 2010, prior to trial, Malott filed a motion in limine seeking to exclude certain autopsy photographs. Malott's motion was subsequently denied. At trial, Malott objected to the autopsy photographs. The trial court admitted the photographs over Malott's objection. At the conclusion of trial, the trial court instructed the jury on voluntary manslaughter. The trial court's instruction stated that the jury could find Malott guilty of the lesser included charge of voluntary manslaughter if it found that he killed Heather in sudden heat. Following a period of deliberations, the jury found Malott guilty of murder and one count of Class B felony confinement. The trial court subsequently sentenced Malott to an aggregate term of seventy years. This appeal follows.

DISCUSSION AND DECISION

I. Whether the Trial Court Abused its Discretion in Admitting Certain Autopsy Photographs

Malott contends that the trial court abused its discretion in admitting certain autopsy photographs at trial.

The admission of photographic evidence is within the sound discretion of the trial court, and this Court reviews the admission of photographic evidence only for abuse of discretion. *Corbett v. State*, 764 N.E.2d 622, 627 (Ind. 2002). Photographs, as with all relevant evidence, may only be excluded if their probative value is substantially outweighed by the danger of unfair prejudice. Ind. Evidence Rule 403; *Corbett*, 764 N.E.2d at 627. Admission of cumulative evidence alone is insufficient to warrant a new trial. *Kubsch v. State*, 784 N.E.2d 905, 923 (Ind. 2003). An appellant must establish that the probative value of the evidence was outweighed by the unfair prejudice flowing from it. *Id.*

Moreover, “[e]ven gory and revolting photographs may be admissible as long as they are relevant to some material issue or show scenes that a witness could describe orally.” *Corbett*, 764 N.E.2d at 627 (quoting *Amburgey v. State*, 696 N.E.2d 44, 45 (Ind. 1998)). Gruesome and gory photographs with strong probative value are admissible where they help interpret the facts of the case for the jury. *Corbett*, 764 N.E.2d at 627. Autopsy photographs frequently pose unique problems where the pathologist has manipulated the corpse during the autopsy. They are generally inadmissible where the body is in an altered condition. *Id.* Nevertheless, “there are situations where some alteration of the body is necessary to demonstrate the testimony being given.” *Swingley v. State*, 739 N.E.2d 132, 133-34 (Ind. 2000).

Helsley v. State, 809 N.E.2d 292, 296 (Ind. 2004). Evaluating whether an exhibit’s probative value is substantially outweighed by the danger of unfair prejudice is a discretionary task best performed by the trial court. *Id.*

Here, the trial court admitted several autopsy photographs which depicted Heather’s injuries. Malott argues that the trial court abused its discretion in admitting these photographs because he does not dispute that Heather died as a result of gunshot wounds. Malott also argues that the trial court abused its discretion in admitting a particular photograph which depicted a bullet or bullet fragments in Heather’s brain after it had been

removed from Heather's body because the photograph is overly prejudicial. In support, Malott relies on the general proposition that when an autopsy photograph focuses on the hollow shell of the victim's body, the probative value of the photograph is outweighed by its unfair prejudicial effect. *See Corbett*, 764 N.E.2d at 628. While we may agree with the general proposition that a photograph depicting the hollow shell of a human body is likely overly prejudicial, we observe that Malott's reliance on this proposition is not applicable to the instant matter because none of the photographs at issue, including the picture of Heather's brain after it had been removed from her body, depict the hollow shell of Heather's body. Rather, the photographs depicted specific injuries suffered by Heather as a result of the gunshot wounds inflicted by Malott, and gave the jury a visual representation of the findings discussed at trial by the pathologist who conducted the autopsy of Heather's body. Thus, we conclude that the autopsy photographs at issue in the instant matter necessarily demonstrate the pathologist's testimony and serve to help the jury interpret the facts of the case. As such, we are not persuaded that the trial court abused its discretion in admitting the photographs.

II. Whether the Evidence was Sufficient to Support Malott's Murder Conviction

Malott next contends that the evidence presented at trial was insufficient to support his murder conviction.

The standard for reviewing sufficiency of the evidence claims is well settled. We do not reweigh the evidence or assess the credibility of the witnesses. Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt.

Stewart v. State, 768 N.E.2d 433, 435 (Ind. 2002). “[I]t is for the trier of fact to reject a defendant’s version of what happened, to determine all inferences arising from the evidence, and to decide which witnesses to believe.” *Holeton v. State*, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006).

In order to convict Malott of murder, the State was required to prove that Malott knowingly or intentionally killed another human being. Ind. Code § 35-42-1-1. The facts most favorable to the judgment show that Malott was holding a gun in his right hand when he entered Heather’s bedroom and found Heather and Lyman in bed together. Malott repeatedly pointed the gun at both Heather and Lyman. Lyman testified that in addition to the loaded gun in Malott’s right hand, he saw that Malott had an extra clip for the gun as well as additional ammunition. Malott was initially angry upon entering the room, but calmed down considerably during the approximately three or four intervening hours before he shot Heather. Lyman testified that Malott calmed down to the point that he was going to allow Lyman and Heather to leave and they were preparing to do so just before Malott shot Heather. As Heather collected her belongings and prepared to leave, Lyman went into the bathroom to smoke a cigarette. While he was in the bathroom, Lyman heard a gunshot. He came out into the bedroom to find Heather “holding her belly.” Trial Tr. p. 74. Lyman then saw Malott shoot Heather in the right shoulder and in the back of the head. It is undisputed that Heather died as a result of gunshot wounds inflicted by Malott. This evidence is sufficient to support the jury’s determination that Malott knowingly or intentionally killed

Heather.

Malott, however, argues that the above-stated evidence was insufficient to support his murder conviction because the State failed to negate the existence of sudden heat, which would have permitted the jury to return a verdict of voluntary manslaughter instead of murder. *See* Ind. Code § 35-42-1-3. In order to convict Malott of voluntary manslaughter, the State was required to prove that Malott knowingly or intentionally killed another human being while acting under sudden heat. Ind. Code § 35-42-1-3. The Indiana Supreme Court has held that “‘sudden heat’ is characterized is 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.” *Brown v. State*, 751 N.E.2d 664, 671 (Ind. 2001) (internal quotation omitted). Once sudden heat has been injected into a case, the State has the burden to negate its existence. *Carroll v. State*, 744 N.E.2d 432, 434 (Ind. 2001). However, although it is the State’s burden to disprove sudden heat, once it becomes an issue, its presence is a question of fact for the jury. *Id.*

In the instant matter, Malott argues that he acted under sudden heat because he became so angry upon finding Heather in bed with Lyman that he “just snapped.” Appellant’s Br. p. 17. In making this argument, Malott relies on the testimony that he was generally a quiet peaceful person. Malott, however, does not explain why he waited approximately three or four hours after finding Heather in bed with Lyman, during which time he calmed down considerably, before he shot Heather. Likewise, Malott does not dispute the testimony that he calmed down considerably during the intervening three or four

hours after finding Heather in bed with Lyman.

At the conclusion of trial, the trial court instructed the jury that if they found that Malott acted with sudden heat, they could find Malott guilty of the lesser-included offense of voluntary manslaughter. Accordingly, because the jury convicted Malott of murder, it necessarily rejected his claim of sudden heat. *See Shields v. State*, 699 N.E.2d 636, 638 (Ind. 1998) (providing that because the jury convicted the defendant of murder, it necessarily rejected the defendant's claims of sudden heat). As we have found the evidence sufficient to support a conviction for murder, there is no error in the jury's rejection of Malott's claim of sudden heat.

III. Whether Malott's Aggregate Seventy-Year Sentence is Appropriate

Malott also contends that his aggregate seventy-year sentence is inappropriate in light of the nature of his offenses and his character. Indiana Appellate Rule 7(B) provides that 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." The defendant bears the burden of persuading us that his sentence is inappropriate. *Sanchez v. State*, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008).

With respect to the nature of Malott's offenses, the record indicates that Malott confined Heather in a bedroom for approximately three or four hours before shooting her numerous times, including in the stomach, the shoulder, and the back of the head. Malott held a loaded gun in his right hand throughout the entire ordeal and, although he eventually agreed to allow Heather and Lyman to leave, shot Heather as she prepared to do so.

With respect to his character, Malott argues that his sentence is inappropriate because prior to his instant offenses, he had a relatively minor criminal history consisting of only two convictions for underage consumption of alcohol. While we commend Malott for his seemingly law-abiding life up to the time of the instant offenses, the record indicates that Malott's character is such that he confined Heather, his ex-girlfriend and the mother of his children, for approximately three to four hours before shooting her numerous times, including in the stomach, shoulder, and the back of the head, while his children slept in a nearby bedroom. Malott has failed to convince us that his aggregate seventy-year sentence is inappropriate.

The judgment of the trial court is affirmed.

KIRSCH, J., and CRONE, J., concur.