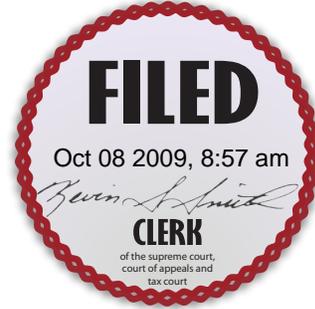


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

D'ANTONETTE BURNS,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 49A05-0901-CR-23

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0709-FA-198810

October 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Defendant D'Antonette Burns challenges her conviction and sentence for Class A felony Conspiracy to Commit Murder,¹ for which she received a sentence of forty years in the Department of Correction, with thirty years executed and ten years suspended, five to probation. Upon appeal, Burns challenges the trial court's exclusion of (1) her testimony regarding statements made to her by informant Jaja Endsley, and (2) testimony by victim Robert Mays's ex-wife Shay Mays ("Shay") regarding his past mistreatment of her. In addition, Burns claims that the trial court abused its discretion with respect to its consideration of certain aggravating and mitigating circumstances and that her sentence is inappropriate in light of her character and the nature of her offense. We affirm.

FACTS AND PROCEDURAL HISTORY

On August 6, 2007, Mays reported to Indianapolis Metropolitan Police that he had been informed by his ex-wife Burns's friend Endsley that Burns was attempting to find someone to kill Mays. Indianapolis Metropolitan Police Officer Tim Heckel met with Endsley, who agreed to set up a meeting between Heckel and Burns.

On August 13, 2007, Officer Heckel, who identified himself as hired assassin "Tim," telephoned Burns twice and arranged to meet with her at Southwestway Park in Indianapolis that day. At their meeting, "Tim" told Burns that he had been abused as a child, that he especially hated child abusers, and that this was something he did not like and would "take care of." Exh. 8 p. 2. Burns told "Tim" that Mays had physically abused their three-year-old child. After "Tim" confirmed that Burns wanted Mays dead,

¹ Ind. Code §§35-42-1-1; 35-41-5-2 (2007).

“Tim” and she discussed his \$3000 fee, her efforts to find money to pay him, and certain places Mays could be found. “Tim” told Burns he would need a gun, a picture of Mays, and his addresses. Burns and “Tim” agreed to talk the next day.

Burns and “Tim” next spoke on August 14, 2007. Burns informed “Tim” that she had everything necessary but the cash, which she was working to obtain. The two spoke again on August 16 and August 24, 2007. During the August 24 conversation, Burns indicated that she had not yet obtained the student loan money she had been counting on. Exh. 12, p.2. “Tim” stated that he would permit her to pay him in two installments, half before the “hit” and half after. Exh. 12, p. 2. On September 4, 2007, the parties spoke again, at which point Burns told “Tim” that she had the first half of the money and that she would have the second half in two to three weeks. On September 6, 2007, “Tim” called Burns to establish a meeting location and time for the next day. At that September 7, 2007 meeting, Burns, accompanied by two of her children, gave “Tim” a shoebox containing a map and directions to Mays’s apartment and place of employment, the address of the day care center where Mays dropped off their child, a description of Mays’s vehicle and license plate number, a picture of Mays, \$1500 cash, and a Ruger 9 millimeter handgun loaded with Black Talon bullets designed to inflict a particularly devastating injury. According to Burns, Endsley provided her with the gun.

“Tim” and Burns spoke on September 13, 2007, when Burns indicated she had almost all of the money for the second installment payment, and on September 19, 2007, when she indicated that she had it all. Following a September 20, 2007 phone call in which they arranged their final meeting, and a September 24, 2007 phone call where

“Tim” told Burns Mays was dead, the parties met later on the 24th at Southwestway Park. There, “Tim” told Burns he had shot Mays twice in the head, and Burns handed “Tim” the second payment of \$1500.

Prior to trial, defense counsel filed a belated notice of insanity defense, which the trial court granted, ordering that the defendant be permitted to present evidence relating to insanity, mental disease or defect, and the effects of battery pursuant to Indiana Code section 35-41-3-11 (2007). Also prior to trial, defense counsel notified the court of its intent to pursue an entrapment defense. The trial court instructed the jury on this entrapment defense.

During trial, defense counsel asked Burns whether another person had suggested killing Mays and whether this person had had individuals picked out to assist in the deed. Burns responded by stating that Endsley had suggested killing Mays and that he had told her he had cousins living in Chicago who could provide assistance. The State objected on hearsay grounds. Tr. p. 641. Following defense counsel’s claim that Burns’s testimony on this point was not entered for the truth of the matter asserted but rather to establish her state of mind, the trial court sustained the State’s objection on Indiana Evidence Rule 803(3) grounds. Defense counsel made no additional offer of proof.

Also during trial, defense counsel sought to elicit testimony from Mays’s former spouse Shay regarding Mays’s alleged prior bad acts during Mays and Shay’s marriage for purposes of establishing Burns’s state of mind. The trial court excluded this testimony. Defense counsel subsequently made an offer of proof on the matter.

Following testimony, including that of two court-appointed psychiatrists who found that Burns's problems with depression did not present themselves at the time of the instant offense or inhibit her ability to appreciate the wrongfulness of her conduct, the jury found Burns guilty but mentally ill. Following a December 18, 2008 sentencing hearing, the trial court sentenced Burns to forty years in the Department of Correction, with ten years suspended, five to probation. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Burns challenges her conviction by claiming that the trial court erred in excluding her testimony regarding Endsley's statements and Shay's testimony regarding Mays's prior bad acts. Burns further challenges the sentencing factors considered by the trial court and claims that her sentence is inappropriate. We address each argument in turn.

I. Exclusion of Evidence

A. Statements by Endsley

Burns first challenges the trial court's sustaining the State's objection to her testimony that Endsley had told her that she should kill Mays and that he had cousins in Chicago who could do it. The State objected to this testimony on hearsay grounds, and the trial court ultimately sustained the State's objection. Defense counsel made no offer of proof regarding related testimony similarly excluded by the court's ruling. The parties now contest the admissibility of this evidence.

1. Standard of Review

The admission of evidence is left to the sound discretion of the trial court, and this court will not reverse that decision absent an abuse of discretion. *Weis v. State*, 825 N.E.2d 896, 900 (Ind. Ct. App. 2005). An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before it. *Id.*

2. Hearsay

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” *Mull v. State*, 770 N.E.2d 308, 311 (Ind. 2002) (citing Indiana Evidence Rule 801(c)). Hearsay is inadmissible unless it falls under an exception. *Pelley v. State*, 901 N.E.2d 494, 504 (Ind. 2009) (citing Ind. Evid. Rule 802), *reh'g denied*.

The trial court appeared to base its ruling upon an interpretation of Indiana Evidence Rule 803(3), which creates a “state of mind” exception to the rule excluding hearsay evidence. In fact, no hearsay exception was necessary here because Burns sought to introduce Endsley's statements merely to show that he had said them to her, not for the truth of the matters asserted. The remaining question, then, is whether these statements were relevant. The underlying substance of these statements, namely that Endsley thought Burns should kill Mays and that he had “hit-men” cousins in Chicago, was relevant to show Burns's state of mind as it related to her entrapment defense because Endsley introduced Burns to “Tim” and allegedly provided a gun to Burns.

Accordingly, because Endsley's statements were relevant and not hearsay, the trial court erred in sustaining the State's objection.

3. Harmless Error

Nevertheless, errors in the admission of evidence are harmless unless the error affects the substantial rights of the parties. *Jones v. State*, 780 N.E.2d 373, 377 (Ind. 2002). We are unpersuaded that the trial court's ruling affected Burns's substantial rights. As the State points out, while the trial court sustained the State's objection, it did not strike the evidence or admonish the jury to disregard Burns's testimony regarding Endsley's statements to her. Importantly, during closing argument, defense counsel pointed to Endsley's role in the initiation of Burns's plans.

More importantly, while Burns claims that Endsley's statements were crucial to demonstrating her entrapment defense, she points to no evidence establishing that Endsley was working on behalf of the State at the time he made these alleged statements. "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *Scott v. State*, 772 N.E.2d 473, 475 (Ind. Ct. App. 2002) (quotation omitted), *trans. denied*. As Burns argued at trial in support of her entrapment defense, the evidence demonstrated that the State initiated all of the phone calls in which the murder-for-hire arrangements were made. Given the abundance of evidence demonstrating the State's direct involvement with Burns, we are unpersuaded that evidence of a civilian's prior involvement, when

that civilian was not demonstrably a State agent, substantially enhanced her entrapment defense.²

Perhaps most significantly, regardless of Endsley's alleged initial influence, the record contained substantial evidence of Burns's efforts to commit the crime long after any initial statements by Endsley. In her conversations with Detective Heckel posing as "Tim," which spanned over a month, Burns said that she had had a gun and had intended to kill Mays herself. A full twenty-five days after Burns first set up Mays's "hit" with "Tim," she provided him with a weapon, pinpointed for him—with directions and maps—Mays's probable locations during the day, and supplied him with specific information in order to identify Mays and his vehicle. Burns remained in repeated contact with "Tim," she answered his phone calls, she met with him at prearranged locations, and she confirmed her intention to follow through with her plan. Any initial influence due to Endsley's alleged proposal does not change Burns's ongoing dedication to the task. We are unconvinced that the trial court's erroneous evidentiary ruling with respect to Endsley's statements compromised Burns's substantial rights. We therefore deem this error harmless.

4. Fundamental Error

With respect to the allegedly related evidence which Burns was precluded from introducing due to the trial court's ruling, Burns acknowledges that she did not make an

² The State may rebut the entrapment defense either by disproving police inducement or by proving the defendant's predisposition to commit the crime. *Riley v. State*, 711 N.E.2d 489, 494 (Ind. 1999).

offer of proof³ but argues that the trial court's ruling constitutes fundamental error. "Failure to make an offer of proof of the omitted evidence renders any claimed error unavailable on appeal unless it rises to the level of fundamental error." *Young v. State*, 746 N.E.2d 920, 924 (Ind. 2001). To rise to the level of fundamental error, an error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." *Maul v. State*, 731 N.E.2d 438, 440 (Ind. 2000) (quotations omitted).

Without an offer of proof, we are unable to divine either the content or the timing of any other alleged statements by Endsley. Assuming that they similarly demonstrate his alleged influence upon Burns's plan, we conclude on grounds similar to those expressed in the above harmless error analysis that their exclusion did not constitute fundamental error.

B. Shay's Testimony

Burns also challenges the trial court's exclusion of Shay's testimony regarding Mays's acts of violence toward Shay during their marriage. Burns sought to introduce this testimony for purposes of establishing her state of mind, which she alleges was relevant to her defenses of insanity and entrapment. The prosecutor objected on Indiana Rules of Evidence 404(b) and 403 grounds, and the trial court sustained its objection.

³ Burns points to *Baker v. State*, 750 N.E.2d 781, 787 (Ind. 2001) for the proposition that in some cases an offer of proof is not necessary so long as the primary reasons for requiring an offer of proof were satisfied. In *Baker* a sidebar discussion of the issue occurred immediately before the witness was to testify and the court made its position plain. *Id.* Here, no such sidebar conference occurred immediately prior to the testimony at issue, nor was there any other readily apparent justification for Burns's failure to make an offer of proof. We are unpersuaded that *Baker* applies to excuse the absence of an offer of proof in the instant case.

Defense counsel then made an offer of proof in which Burns testified to her beliefs that (1) Mays had a physically abusive relationship with Shay and that (2) Mays had probably burglarized Shay's house because Burns suspected Mays in the burglary of her own house.⁴

Indiana Evidence Rule 404(a) operates as a general exclusion on character evidence to prove conduct and provides as follows: "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion" The admissibility of evidence about prior bad acts by persons other than defendants is subject to Indiana Evidence Rule 404(b). *Garland v. State*, 788 N.E.2d 425, 430 (Ind. 2003). Under Rule 404(b), "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" To decide whether character evidence is admissible under Rule 404(b), the trial court must (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Indiana Rule of Evidence 403. *Hauk v. State*, 729 N.E.2d 994, 1001 (Ind. 2000).

In challenging the trial court's exclusion of this evidence, Burns's argument rests largely upon her allegation that it was not introduced for the truth of the matters asserted.

⁴ Shay did not testify during this offer of proof.

Of course, whether or not certain evidence runs afoul of the hearsay rule, it is still inadmissible under Rule 404 if it qualifies as invalid character evidence. Further, even if Burns's state of mind were a valid basis for introducing evidence of Mays's prior bad acts under Rule 404(b), Burns fails to demonstrate that the probative value of this evidence was not substantially outweighed by its prejudicial effect under Rule 403. Regarding the "burglary" evidence, there was no showing beyond pure speculation that Mays was responsible for it, nor was there any showing that such "burglary," as the trial court observed, was ever reduced to a charge, let alone a conviction. Indeed, based upon Burns's offer of proof, the only apparent link between Mays and the alleged burglary of Shay's home was Burns's suspicion that Mays had burglarized her own home and therefore had "probably" burglarized Shay's home as well. Tr. p. 703. In addition, all of the alleged bad acts apparently occurred during Mays and Shay's marriage, which ended at least four years before Burns and Mays married, and approximately seven years before Burns committed the instant conspiracy to murder Mays. Their probative value with respect to Burns's state of mind at the time of her conspiracy, therefore, appears to be minimal. Moreover, with respect to the prejudicial effect of such evidence, these allegations of criminal conduct and ongoing abuse directly impugn Mays's character, challenging his "victim" status, and compromising the State's case against Burns. Given the great prejudicial effect of such evidence and its minimal probative value, we are unpersuaded that the trial court abused its discretion in excluding it.

In any event, of course, errors in the admission of evidence are harmless unless the error affects the substantial rights of the parties. *Jones*, 780 N.E.2d at 377. To the extent

the exclusion of Shay's testimony was error, Burns's substantial rights were not affected. Burns testified at length to facts affecting her state of mind, including that Mays had been physically abusive toward her and their own son. Because the jury was aware of Burns's belief that Mays had abused her and her own son, we cannot say that the additional impact of Burns's belief that Mays had abused a former spouse years before would have substantially affected its evaluation of her state of mind. Any error was therefore harmless.

II. Sentence

Burns additionally challenges her sentence of forty years in the Department of Correction, with ten years suspended, five to probation, by first claiming that the trial court abused its discretion by considering certain aggravating circumstances and failing to consider certain mitigating circumstances. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007). "An abuse of discretion occurs 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.'" *Id.* (quoting *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006) (internal quotation omitted)). A trial court may abuse its discretion by failing to issue a sentencing statement, by entering a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, by entering a sentencing statement that omits reasons clearly supported by the record and advanced for consideration, or by giving reasons that are improper as a matter

of law. *Id.* at 490-91. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record. *Id.* Under the current sentencing scheme, a trial court can no longer be said to have abused its discretion by improperly weighing aggravating and mitigating factors. *See id.* at 491.

A. Mitigating Factors

In claiming that the trial court abused its discretion, Burns first challenges the trial court's alleged rejection of certain mitigating factors she claims were supported by the record, including the hardship of Burns's incarceration to her children, her mental illness, her potential for rehabilitation, and the unlikelihood that these circumstances will recur. In discussing these mitigating factors at length, the trial court stated as follows:

Other factors in mitigation that your attorney has argued for include rehabilitation, that you're someone who will be rehabilitated, that these are circumstances unlikely to recur. Both of those I pause before—I pause, and I'm not sure I can find either of those as mitigating circumstances, because quite frankly, as far as being unlikely to recur, I seriously doubt that's true, if you're ever in this same circumstance.

It's possible you could have more children after this with another man. If you're ever in this same circumstance, because you have convinced yourself that there is no way the system can help you, I think you would take matters into your own hands again. But next time you'd probably make sure that you didn't get arrested by after [sic] undercover police officer.

So I can't find that's unlikely to recur, because based upon what you did here and the extent and the planning that you took to commit this offense, I think someone that's willing to do that and go to that length, when she clearly had other options available to her, including asking a court to reconsider its rulings, including going to a mother who is now in a position to help people who have gone through situations like you, going

back to Legacy House, going to another counselor—you had many other options. You chose not to take them.

So being unlikely to recur in the future I cannot find. Whether you're able to be fully rehabilitated I don't know. I hope so.

And as far as the mentally ill verdict that the jurors returned, well, clearly they gave some consideration to the evidence you put in as a defense in this case. And quite frankly, your attorney obviously did a good enough job for you that there were made—that they made a recommendation of guilty, but mentally ill. They could've just said guilty.

So clearly, there was something presented to them—and it didn't come from the State's case—that convinced them that you do suffer from some sort of mental illness. Now, it could only be depression. And quite frankly, I don't recall anything in the evidence other than depression that would even qualify as some type of mental illness that you might suffer from.

But to also say automatically that because you've been given a guilty, but mentally ill verdict, that now I have to consider that and make that a mitigating circumstance I don't believe is the law. I think that I have to consider it, and perhaps—if I find aggravating circumstances, perhaps temper that mitigating circumstance with any aggravators I might find. But I also think that I need to look at the extent of the mental illness that was supported by the record.

And in doing so, I did consult some case law before I came in today because I, quite frankly, expected that to be one of the arguments today. And one of the things that the case law guides the courts on is that there are factors a judge should consider when a guilty, but mentally ill verdict has been returned in deciding how much weight to give to that, or whether the Court should give any deduction in an aggravated sentence as a result of this.

Some of the things, then, that I have considered are the extent of your inability to control your behavior due to the mental illness, any overall limitations you had on your ability to function, the duration of the mental illness, and the extent of any nexus between that and the commission of the crime.

So in considering those four factors that have been identified in the *Weeks [v. State]* case, 697 N.E.2d 28 [(Ind. 1998)], it's hard to give a lot of weight to this because you were so able to function in society so well, better than many defendants that sit in your chair before you. You had a job. You had a job that made \$13 an hour.

You were in school. We all know what you were in school for. And instead of being on the right side of a crime scene investigation, you were on the wrong side, making the crime happen. So you were clearly able to function.

So the fact that you may have some mental illness has not set you back very far, if at all. And for that reason, I do not give that mitigating circumstance significant weight.

And then finally hardship on dependents, I just feel for your children. I truly do, because I think you used them when it was convenient for you. I saw them paraded into this courtroom during closing arguments. I saw them in a video when you were committing your crime. And I hear you talking about them as one of the main reasons why you regret this.

Well, sure. It is hard not to be with mom. It is. And every child, in my opinion, should have both parents, if both parents are good functioning adults. And let's not forget that you were trying to take away the father of one of those children when you committed this crime.

So it's kind of hard, also, for me to give significant weight to the hardship on your dependents, because, quite frankly, if you're going to parade your dependents around when you commit this type of crime, you're not the type of mother who should have her children with her. So for that reason I do not give that mitigating circumstance significant weight.

Tr. pp. 968-973 (emphases supplied).

1. Mental Illness and Hardship on Dependents

With respect to the mitigating factors of mental illness and hardship on dependents, the trial court clearly considered them but did not afford them significant weight. Under *Anglemyer*, a trial court cannot be said to have abused its discretion by failing to properly weigh or balance sentencing factors. 868 N.E.2d at 491. We find no abuse of discretion.

2. Potential for Rehabilitation and Unlikelihood that Circumstances Will Recur

With respect to the mitigating factors of potential for rehabilitation and unlikelihood that the circumstances will recur, the trial court similarly considered but rejected them as significant mitigating factors. The court's reasoning for doing so—specifically that Burns's long-thought-out crime suggested she could do it again if similar

circumstances arose—enjoys support from the record. Indeed, Burns participated in actively planning and contemplating Mays’s death for at least six weeks. The trial court did not abuse its discretion in rejecting these proposed mitigating factors.

B. Aggravating Factors

Burns also challenges the trial court’s consideration of certain aggravating factors in sentencing her, specifically the nature and circumstances of her crime, the fact that she committed it in the presence of her children, and that the imposition of a reduced sentence would depreciate the seriousness of the offense. In discussing these factors, the trial court stated as follows:

Now, let me turn to aggravating circumstances. Clearly, the nature and the circumstances of your crime is an aggravating circumstance. You know, [the prosecutor] referred to, I think, the degree of planning and that it occurred over a month period of time. It actually occurred over six weeks, because I looked at the calendar.

And when you think about that, when you think about all the phone calls we heard in your trial, when you think about even the couple of meetings that you had with the undercover officer, when you think about all of the time that you would’ve had during that six-week period to change your mind, to put the halt on it, to stop it, to even go to the police and say I’ve got myself in this terrible mess, to go to your mom, to go to your counselor, to go to anyone—you had an attorney in your civil case you could’ve gone to.

All of those times for six weeks you had all of those moments to change your mind, and you didn’t. In fact, in my opinion, you used that time to make sure you had all the tools you needed to make sure it happened, to get all the money together, to get the gun clean of prints, to get the ammunition, to get the Google map, to get the picture. All of those things that I’ve just listed go into the nature and circumstances of your offense being particularly aggravating.

And then to top it all off, you bring your children with you during the conspiracy. And not just your children are heard in a telephone call when you’re—you know, your hit man is miles away; you can hear the kids in the background. No it’s not that. It’s oh, I bring the kids in the car when I’m transporting the gun that’s going to kill one of my children’s father.

That is, to the Court, the most significant aggravating circumstance, is that you committed your crime in the presence of children. And not just any children at a park that day; your children running around the car, peeing in the parking lot, while you sit there talking to your hit man. That is a significant aggravating circumstance.

And finally, I've considered that reduction of this sentence, which I have considered because it was what I believed I would be hearing as an argument, not just a minimum sentence, but a suspended sentence in your case—it is my belief that reducing the sentence below the advisory, or entirely suspending your sentence, or giving you a short-term period of incarceration would clearly depreciate the seriousness of the offense you committed.

Tr. pp. 973-76.

1. Nature and Circumstances

Burns first claims that the trial court abused its discretion by considering as an aggravating factor her extensive planning, which she claims is an element of her conspiracy offense. As the State points out, under the post-2005 sentencing scheme which grants a trial court discretion to impose any sentence within a sentencing range, the rule that a trial court may not use a material element of a crime as an aggravating circumstance to support an enhanced sentence is no longer valid. *See Pedraza v. State*, 887 N.E.2d 77, 80-81 (Ind. 2008). In any event, the trial court's consideration of the nature and circumstances was more focused upon the particularized circumstances regarding the length of Burns's planning rather than the planning element itself. We find no abuse of discretion. *See Henderson v. State*, 769 N.E.2d 172, 180 (Ind. 2002) (observing that particularized circumstances of criminal act, distinct from material element of offense, may serve as aggravator).

2. Commission of Offense in Presence of Children

Burns next challenges the aggravating circumstance that she committed the offense at issue in the presence of her children. The commission of a crime in the presence of minor children may be considered an aggravating circumstance. *Cloum v. State*, 779 N.E.2d 84, 87 (Ind. Ct. App. 2002). The exhibits demonstrate that part of Burns's offense occurred in the presence of her children. Indeed she brought her children with her when she met Detective Heckel to give him a gun, maps, directions, and money to kill Mays. Burns does not challenge the legitimacy of this aggravator or claim that it is unsupported by the record. Instead, she challenges the extent to which this aggravator should be used to enhance her punishment, which is essentially a challenge to its weight. Under *Anglemyer* this court does not review the relative weight of aggravators and mitigators. 868 N.E.2d at 491. We find no abuse of discretion.

3. Imposition of Reduced Sentence Depreciates the Seriousness of the Offense

Burns contends that the trial court abused its discretion by erroneously considering the “depreciate the seriousness” aggravator to justify her sentence, which is in excess of the advisory. While there is language to support Burns's contention that the “depreciate the seriousness” aggravator is improper when the trial court is considering an enhanced sentence, *see Cotto v. State*, 829 N.E.2d 520, 524 (Ind. 2005) (observing that this factor “serves only to support a refusal to impose less than the presumptive sentence and does not serve as a valid aggravating factor supporting an enhanced sentence”), the Supreme Court has since clarified that “it is not error to enhance a sentence based upon the aggravating circumstance that a sentence less than the enhanced term would depreciate

the seriousness of the crime committed.” *Mathews v. State*, 849 N.E.2d 578, 590 (Ind. 2006). In any event, while Burns contends that the sentencing statement is ambiguous with respect to the operation of this aggravator, a plain reading of the record shows that the trial court used this factor to justify its refusal to impose the minimum and/or a fully or mostly suspended sentence. We find no abuse of discretion.

C. Appropriateness

Burns also challenges the appropriateness of her forty-year sentence in the Department of Correction, with ten years suspended, five to probation. 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) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the “Court 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.” We exercise deference to a trial court’s sentencing decision, both because Rule 7(B) requires that we give “due consideration” to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant’s burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

Burns committed a Class A felony, so she was subject to a sentence of between twenty and fifty years, with the advisory sentence being thirty years. *See* Ind. Code § 35-

50-2-4 (2007). The trial court sentenced Burns to forty years but suspended ten years, five to probation. We are not convinced that this sentence is inappropriate.

With respect to the nature of the offense, Burns engaged in a prolonged, premeditated, six-week scheme, partly in the presence of her children, to research and plan the violent death of her ex-husband, who was the father to one of those children. With respect to her character, Burns, though perhaps afflicted by mental illness, had adequate clarity of mind to pursue her murder-for-hire scheme undeterred by any apparent second thoughts. She sought to use a particularly devastating weapon, she made sure that Mays could be identified at a number of locations, and she paid the full amount due to close the deal on his death. Whether or not Burns believed her cause was righteous, such reckless vigilantism is never justified. Perhaps most significantly, Burns was fully willing to expose her children to her deadly scheme, refuting her alleged interest in protecting them. In light of her acts and her character as it is illuminated by these acts, we are unpersuaded that Burns's sentence of forty years, with thirty years executed in the Department of Correction, and ten years suspended, five to probation, is inappropriate.

The judgment of the trial court is affirmed.

BAILEY, J, and VAIDIK, J., concur.