

Julius Solis appeals his conviction and sentence for voluntary manslaughter as a class A felony.¹ Solis raises several issues, which we revise and restate as follows:

- I. Whether the trial court committed fundamental error when it did not *sua sponte* declare a mistrial;
- II. Whether the court abused its discretion in admitting certain photographs;
- III. Whether the court abused its discretion in excluding certain testimony;
- IV. Whether the court abused its discretion when it declined to give Solis's proposed instruction on self-defense to the jury;
- V. Whether the court abused its discretion in sentencing Solis; and
- VI. Whether Solis's sentence is inappropriate.

We affirm.

The relevant facts follow. On May 3, 2009, Manuel Martinez, Jr. had a gathering with several of his family members and friends at his house in East Chicago, Indiana. Around 3:30 p.m., a group of people, which included among others Martinez, Martinez's son Alonzo Cavazos, his brother Tomas Zapata, his niece Christina Zapata, and his friend Rolando Leal, were congregated outside of Martinez's house. Martinez heard gunshots coming from an area between two houses and "hit the floor." Transcript at 71. Martinez saw two people run toward an alley, and he ran to the alley and observed Solis and his younger brother Elijah running away from the house. Martinez then ran back toward the front of his house and saw his son Cavazos on the ground. Leal and another man chased

¹ Ind. Code § 35-42-1-3 (2004).

after Solis and Elijah and shot at them. Martinez ran back toward the alley and, as he was running, heard additional gunshots from the direction of the alley.

East Chicago Police Officer Alejandro Campos was on patrol in the area when he heard four to five gunshots. Officer Campos immediately started to drive toward the direction of the shots and, approximately twenty to thirty seconds later, heard two to three additional gunshots. Officer Campos observed Solis and Elijah enter a house where Melvin Tucker resided and where Solis and Elijah had visited to get some marijuana earlier in the day. Tucker approached Officer Campos, told him that two males had gone inside his house and that his children were inside. Officer Campos called for backup. At that point, Tucker's sons and a couple of their friends ran out of the house through the front door.

After backup arrived at the scene, Officer Campos and other police officers entered Tucker's house, discovered Solis and Elijah in a bedroom, placed them under arrest, and located two firearms with live rounds remaining in them hidden in the room. Eleven bullet casings recovered in the area were linked to the guns and another eight casings were determined to not have been fired from the guns. Martinez identified Solis and Elijah as the two people who "had done the shooting over at his house." Id. at 269. Cavazos had been struck by a bullet in the back of his neck and died as a result of the injury.

In a police statement, Solis stated that the discovered firearms were his guns. Solis further stated that he and Elijah saw the men in the yard, that one or two of them pulled guns out, and that he pulled out his guns because he knew they were going to try

to kill him. Solis stated that he shot first, that then the men ran after him shooting, and that if he had not shot first then he and Elijah would have been killed.

On May 5, 2009, the State charged Solis with murder. On September 1, 2009, the State filed an amended information which included additional counts for voluntary manslaughter as a class A felony and reckless homicide as a class C felony. Prior to trial, the parties filed motions *in limine* related to the exclusion of certain anticipated evidence at trial, and the parties resolved the issues by agreement. The State's evidence at trial included several autopsy photographs and the testimony of Martinez. Evidence was presented that Leal had been a suspect in the October 2008 murder of Solis's older brother. While on the stand, Martinez made an unsolicited statement suggesting that Solis or Elijah had previously shot at his house, and the trial court admonished the jury not to consider the statement. Solis desired to elicit certain testimony from Elijah regarding a previous encounter with Leal, and over Solis's objection the court limited Elijah's testimony. Solis proposed a jury instruction regarding self-defense which the trial court rejected. A jury found Solis guilty of voluntary manslaughter as a class A felony and reckless homicide as a class C felony and not guilty of murder. The trial court entered judgment on voluntary manslaughter as a class A felony only. The court found Solis's juvenile and adult criminal history, including his failures on probation, the fact that Solis was under court supervision at the time of the crime, and the fact that prior leniency had had no deterrent effect to be aggravating circumstances. The court found Solis's age, the fact that he had no prior felony convictions or significant period of incarceration, and that he had no history of violent behavior to be mitigating

circumstances. The court also noted that the history of violence in the life of Solis and his family suggested that there was some provocation leading to Solis's possession of a weapon. The court found the mitigating factors to be equal to the aggravating factors and sentenced Solis to thirty years in the Department of Correction.

I.

The first issue is whether the court committed fundamental error in not declaring a mistrial. At trial, Martinez was asked “[a]t this point, what is everybody doing[?]” and Martinez stated: “Just more or less standing around talking and then I was trying to tell my son and them to come inside because I had seen Javier Solis ride by a couple times and his son had shot at my house before.”² Transcript at 66. Solis's defense counsel objected on the basis of Ind. Evidence Rule 404(b) and the court's grant of a motion in limine, and the court stated that it could give an admonishment to disregard the statement. The court admonished the jury to disregard Martinez's comment.

Solis acknowledges that “[t]he trial court did admonish the jury to disregard the testimony and that the information was not solicited by the [S]tate.” Appellant's Brief at 9. Solis argues “[y]et, due to the extremely prejudicial nature of Martinez's testimony, i.e., that Solis had previously shot at his house, this statement affected the jury's verdict” and that “[t]he trial court should have also declared a mistrial despite the failure of defense counsel to request the same.” Id. Solis asserts that Martinez's comment informed the jury “about ‘bad blood’ between the families, that Solis had deliberately fired a gun at Martinez's house in the past, that Martinez feared he would do so again or

² Javier Solis is Solis's father.

worse” and that “this evidence had to have contributed to the jury finding that Solis committed manslaughter or, at the least, reckless homicide.” Id. at 10. Solis contends that a mistrial should have been granted and that the failure of the trial court to do so was fundamental error. Solis asserts that admonishment to the jury “could not cure the prejudicial effect of Martinez’s statement.” Id. at 11.

The State argues that Solis’s failure to request a mistrial results in waiver of the issue. The State asserts that the court instructed the jury to disregard Martinez’s statement and thus that “the jury did not consider [Martinez’s] statement.” Appellee’s Brief at 11. The State argues that “[u]ltimately, [Solis’s] claim at trial was that he shot in self-defense, and the jury acquitted him of murder, finding that he acted under sudden heat and committed voluntary manslaughter,” that Solis later presented evidence that he knew Leal was “involved in a ‘run-in’” with Elijah and that Solis and Elijah knew that Leal was a suspect in the murder of their older brother, and that “[i]n light of these facts and the fact that the jury was immediately instructed that [Martinez’s] unsolicited statement was to be disregarded, there is no fundamental error here.” Id. at 12.

Initially, we note that Solis concedes that he waived review of this issue by failing to request a mistrial. See Strain v. State, 560 N.E.2d 1272, 1274 (Ind. Ct. App. 1990) (finding waiver where the defendant failed to object to challenged testimony and moved for mistrial only after a lengthy cross-examination of the witness), trans. denied. To the extent that Solis claims fundamental error, we note that the Indiana Supreme Court has held: “To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. To be 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.” Benson v. State, 762 N.E.2d 748, 755 (Ind. 2002) (internal quotation marks and citations omitted).

Following Martinez’s statement that Solis or Elijah had previously shot at his house, Solis’s defense counsel objected, and the trial court admonished the jury and stated:

I’m informing you, jury, that the last statement by this witness really has no bearing on this case. It was unsolicited by the [S]tate and I’m telling you at this point that you are to disregard it and it should not enter into any consideration as we move forward with this case[.] [Y]ou should not discuss it at all during any of your breaks or when it comes down to deliberation.

Transcript at 69. Later during the trial on cross-examination of Elijah, Solis’s counsel asked Elijah if, prior to May 3, 2009, Elijah had “any run-ins or problems with [Leal],” whether he had the “opportunity to discuss that with” Solis, and whether he was aware that Leal was a suspect in the October 2008 murder of Elijah’s brother, and Elijah responded affirmatively. Id. at 505.

Based upon the record, we cannot say that Solis was prejudiced by Martinez’s comment so as to make a fair trial impossible or that any harm or potential for harm was substantial. We conclude that Solis has failed to demonstrate prejudice by Martinez’s comment, and the trial court admonition sufficed to cure any error. See Banks v. State, 761 N.E.2d 403, 405 (Ind. 2002) (holding that the trial court did not err in denying a motion for a mistrial where the court admonished the jury to disregard a witness’s

remark). The court did not commit fundamental error in not *sua sponte* declaring a mistrial as a result of Martinez's unsolicited statement.

II.

The next issue is whether the trial court abused its discretion in admitting certain photographs. Over Solis's objection, the court admitted into evidence three photographs depicting Cavazos's body following an autopsy. Solis argues that the pathologist "used a diagram to show the jury where the bullet entered and exited Cavazos's neck and head" and that "[d]espite this clear testimony which was understandable to the jury, the [S]tate also moved to admit autopsy photographs showing the bullet's entry and exit." Appellant's Brief at 12. Solis argues that "[t]he only purpose for using the photographs was to inflame the jury against Solis" and that "[t]he evidence was also cumulative of [the forensic pathologist's] testimony." *Id.* Solis further asserts that the "photographs are gruesome by their very nature," that "any relevancy was greatly outweighed by the prejudicial impact of seeing the victim's neck, hand and face lying on an autopsy gurney," and that the trial court "committed reversible error" in admitting the photographs and "a new trial is warranted." *Id.* at 15.

The State argues that the court did not abuse its discretion in admitting the challenged photographs, that the photographs "did not feature gruesome or inflammatory details of the crime" and "are not gory or sensational," and that the photographs "were probative simply because [they] allowed the jury to see the wounds and to place [the pathologist's] testimony in context." Appellee's Brief at 13. The State further asserts that Solis's "claim at trial was self-defense—that [] he had drawn his weapon and fired

because he and his brother were being fired upon.” Id. at 14. The State also argues that “[t]hree basically illustrative autopsy photos during three days of evidence had no improper prejudicial effect on the jury requiring reversal” and that “[a]ny error in admitting the photos was harmless.” Id.

The admission of photographic evidence is within the sound discretion of the trial court, and we review the admission of photographic evidence only for abuse of discretion. Helsley v. State, 809 N.E.2d 292, 296 (Ind. 2004) (citing Corbett v. State, 764 N.E.2d 622, 627 (Ind. 2002)). Photographs, as with all relevant evidence, may be excluded only if their probative value is substantially outweighed by the danger of unfair prejudice. Id. (citing Ind. Evidence Rule 403; Corbett, 764 N.E.2d at 627). Admission of cumulative evidence alone is insufficient to warrant a new trial. Id. (citing 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. The Indiana Supreme Court has stated:

Relevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. Even 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. Photographs, even those gruesome in nature, are admissible if they act as interpretative aids for the jury and have strong probative value.

Corbett, 764 N.E.2d at 627 (internal citations and quotation marks omitted). A defendant is not entitled to have his actions sanitized when evidence is presented to a jury. See Reaves v. State, 586 N.E.2d 847, 859 (Ind. 1992) (citing Shelton v. State, 490 N.E.2d 738, 743 (Ind. 1986)). 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. Helsley, 809 N.E.2d at 296 (citing Dunlap v. State, 761 N.E.2d 837, 842 (Ind. 2002)).

The photograph in State's Exhibit 46 shows the entry wound on the back of Cavazos's neck. The photograph in State's Exhibit 47 shows a laceration on the knuckle of one of Cavazos's hands. The photograph in State's Exhibit 48 shows the front of Cavazos's face and depicts the right side corner of his mouth. At trial Young Kim, the pathologist who performed the autopsy of Cavazos's body, testified regarding the depictions in the photographs and that Cavazos died from a bullet which entered the back of his neck and exited through the right corner of his mouth. The photographs illustrate the testimony regarding the path of the bullet, and we cannot say the photographs could not have helped the jury understand the testimony and sort out the issues. In addition, the three admitted autopsy photographs are not particularly gruesome.

After reviewing the record and challenged exhibits, we cannot say that the prejudicial impact of the admission of the autopsy photographs outweighs their probative value. The trial court did not abuse its discretion in admitting the photographs. See Helsley, 809 N.E.2d at 296 (holding that the trial court did not abuse its discretion in admitting the several photographs showing the gunshot wounds to the victims' heads where the defendant argued the photographs were cumulative and that there was no issue that the victims died from gunshot wounds); Rice v. State, 916 N.E.2d 962, 966-967 (Ind. Ct. App. 2009) (holding that the autopsy photographs were not unnecessarily gruesome and were not bloody or gory and noting that, although the defendant argued there was no

dispute as to the cause of the victim's death, the court did not abuse its discretion in admitting autopsy photographs which could have helped the jury understand the testimony and sort out the issues).

III.

The next issue is whether the court abused its discretion in excluding certain testimony. At trial, Solis's counsel questioned Elijah on cross-examination regarding the events of May 3, 2009. Elijah indicated that he knew Leal and that he or one of his family members had problems with Leal. At that point, the prosecutor requested to "approach . . . to get an offer of proof" to determine if Solis's defense counsel planned "to go into character evidence that goes beyond the scope of what we've talked about." Transcript at 496.

Solis's counsel stated that he wished to elicit testimony that "in this young man's mind . . . he was aware that [] Leal was . . . identified as a suspect in his older brother's murder which has already been introduced." Id. Solis's counsel further stated there were two other incidents, in January 2009 and in February 2009, during the latter of which "Leal according to police reports chased this young man with a gun." Id. The court stated that evidence of the incident was inadmissible and that the proposed testimony did not bear on whether the incident "caused fear in [Solis] leading to the issue of self-defense," that "this may be [a] different analysis if [Solis] testifies," that "then maybe a specific instance of conduct would be relevant because he knows specifically that has happened in the past pertaining to his own brother," but that "it's not going to come in through [Elijah]." Id. at 497. The court also stated that "[i]t's a very specific instance of

conduct that can only be verified through the defendant because that's what caused the fear in the defendant's mind." Id. at 497-498. The prosecutor stated that by Solis's rationale "anything could come in," that "[w]e're relying on the defendant's brother to say yes, I told him all about it and by that rationale, we can get into 10 separate instances," and that "there's got to be some limits to how much outside stuff we get into." Id. at 498-499. Solis's counsel stated that the January 2009 incident involved Solis being "shot in the face by a vehicle where [] Leal was in the vehicle at the time and he's obviously aware of that." Id. at 500. The trial court asked whether Elijah "was there," and Solis's counsel stated that "[h]e was not there," that "[t]hey discussed it once again," and that "we're going into his mind set." Id.

The court ruled that Solis's defense counsel could "discuss through [Elijah] whether he . . . has prior contact with Leal" and "whether he discussed that with his brother." Id. at 501. The court stated "we are only talking about [the] February '09 incident" and that "[n]o specifics, because those specifics have to come out only through the defendant." Id. The court also found that the January 2009 incident "can certainly come out through the defendant, not through this witness." Id. at 504.

Solis's counsel then asked Elijah, in the presence of the jury, whether he had "any run-ins or problems with" Leal prior to May 3, 2009, and Elijah stated "Yes." Id. at 505. Solis's counsel asked Elijah whether he had an opportunity to discuss with Solis the problems with Leal prior to May 3, 2009, and Elijah responded affirmatively. Elijah indicated that he was aware that Leal was a suspect in the October 2008 murder of his older brother and that he talked about that with Solis before May 3, 2009.

On appeal, Solis argues that his counsel “wanted to question Elijah about a previous incident where [] Leal chased Elijah with a gun and whether Elijah discussed this incident with Solis,” that the court “would not allow defense counsel to go into specifics about the encounter,” and that “[l]imiting the extent of the questioning was reversible error.” Appellant’s Brief at 15-16. Solis asserts that he “had a reasonable fear that Leal would harm him because Leal had also chased Elijah with a gun on an earlier occasion.” Id. at 16. Solis argues that the court erred “in not allowing the jury to learn that Solis knew Leal had previously chased people with a gun,” that “such information, coupled with the eyewitness testimony that one man was chasing two others, could have convinced the jury that Solis was acting in self-defense when he fired the gun and mistakenly killed Cavazos,” and that “the wrongful exclusion of this evidence undermined Solis’s claim of self-defense.” Id. at 17. Solis further asserts that “[t]he exclusion cut to the very core of his self-defense claim and it was reversible error to keep it out” and that “[i]f the jury knew that Leal had previously been an aggressor, they very well could have returned a different verdict.” Id.

The State argues that “[t]he trial court’s restriction was in accord with the purpose of the rule that allows evidence of a defendant’s knowledge of specific instances of violence on the part of a victim to explain the state of mind when there is a claim of self-defense, but guarded against the jury receiving information that could possibly be untrue.” Appellee’s Brief at 17. The State asserts that “Elijah correctly testified that he told his brother about a prior run in with Leal,” that Solis’s “understanding of the particular details of that incident . . . were details that Elijah could not give,” and that

“[t]his was not [Solis’s] own testimony as to how he perceived the situation, and the trial court properly restricted Elijah’s testimony.” Id. at 17. The State also argues that any error regarding the court curtailing Elijah’s testimony was harmless and points to the facts that Solis argued self-defense, that the jury acquitted Solis of murder and convicted him of voluntary manslaughter, and that the jury knew “that there was bad blood between [Solis’s] family and his claimed attacker.” Id. at 18.

The admission and exclusion of evidence is a matter within the sound discretion of the trial court, and we will review only for an abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances before the court. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh’g denied. Generally, errors in the admission or exclusion of evidence are to be disregarded as harmless unless they affect the substantial rights of a party. Coleman v. State, 694 N.E.2d 269, 277 (Ind. 1998); Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995). An error will be found harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. Gault v. State, 878 N.E.2d 1260, 1267-1268 (Ind. 2008).

“A self-defense claim can prevail in a homicide prosecution only if the defendant had a reasonable fear of death or great bodily harm.” Zachary v. State, 888 N.E.2d 343, 347 (Ind. Ct. App. 2008) (citing Mickens v. State, 742 N.E.2d 927, 930 (Ind. 2001)), trans. denied; see Ind. Code § 35-41-3-2. The jury looks from a defendant’s viewpoint when considering facts relevant to self-defense. Id. (citing Morgan v. State, 544 N.E.2d

143, 148 (Ind. 1989), reh'g denied). However, the defendant's belief must be reasonable.
Id.

Generally, proof of a person's character is inadmissible to prove that the person acted in a manner consistent with that character on the occasion in question. Id. An exception is made when the defendant in a homicide or battery case offers evidence to prove that the victim was the initial aggressor or the victim had a violent character and the defendant's knowledge of that character gave him reason to fear the victim. Id. Ind. Evid. Rule 404(a)(2) provides for the admissibility of "evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor"

This court has observed that when a defendant claims that he acted in self-defense, evidence legitimately tending to support his theory is admissible. Brand v. State, 766 N.E.2d 772, 780 (Ind. Ct. App. 2002), reh'g denied, trans. denied. Further, evidence of a victim's character may be admitted to show that the victim had a violent character giving the defendant reason to fear him. Id. (citing Holder v. State, 571 N.E.2d 1250, 1254 (Ind. 1991)). The victim's reputation for violence is pertinent to a claim of self-defense. Id. However, the evidence introduced by a defendant to show his apprehension of the victim must imply a propensity for violence on the part of the victim. Id. Although the victim's threats or violence need not be directed toward the defendant, the defendant must have knowledge of these matters at the time of the fatal confrontation between the victim and

the defendant. Id. In addition, a defendant must first introduce appreciable evidence of the victim's aggression to substantiate the claim of self-defense before evidence is admissible to show the reasonableness of the defendant's fear of the victim. Id.

The record reveals that the jury heard Elijah's testimony that he had had "run-ins or problems" with Leal, that he was aware that Leal was a suspect in the murder of his older brother, and that he had discussed both of these issues with Solis prior to May 3, 2009. See Transcript at 505. In addition, the jury heard testimony from East Chicago Police Detective Maurice Phillips that he had investigated the 2008 murder of Solis's older brother, that Leal was the first suspect that he had focused on in that case, and that Solis's cousin had identified Leal in a photo line-up. Further, the jury heard testimony from one of Tucker's sons, who indicated that Leal was a violent and aggressive person. The jury also heard evidence that persons other than Solis had fired a weapon on May 3, 2009.

We conclude based upon the record that Elijah's testimony related to his previous encounter with Leal in February 2009 would not have had a probable impact on the jury or an impact on the verdict, that the exclusion of this testimony under the circumstances did not affect Solis's substantial rights, and that the trial court did not abuse its discretion in limiting Elijah's testimony. See Pitts v. State, 904 N.E.2d 313, 319 (Ind. Ct. App. 2009) (concluding that certain excluded evidence would not have had a probable impact on the jury, that the exclusion of this evidence did not affect the defendant's substantial rights, and that the trial court did not abuse its discretion in excluding this testimony), trans. denied; Mathis v. State, 776 N.E.2d 1283, 1286-1287 (Ind. Ct. App. 2002) (holding

that the trial court properly excluded evidence that would not have had any impact on the verdict), trans. denied; see also Welch v. State, 828 N.E.2d 433, 438 (Ind. Ct. App. 2005) (discussing Ind. Evid. Rule 404 and Brand, 766 N.E.2d 772, and holding that the defendant did not demonstrate error with regard to the trial court's exclusion of evidence).

IV.

The next issue is whether the court abused its discretion in declining to give Solis's proposed instruction on self-defense to the jury which was:

Actual danger is not necessary to justify self-defense. The question of the existence of such danger, the necessity of apparent necessity to act, and the amount of force necessary to resist a perceived attack can only be determined from the standpoint of the accused under all the circumstances existing at the time. If a person is confronted by an appearance of danger which arouses in his mind an honest conviction that he is about to suffer death or great bodily harm, and if a reasonable person in same situation, knowing the same facts, would be justified in believing himself in danger, then the accused's right of self-defense is the same whether the danger is real or not. A person may use the force reasonably necessary to resist an attack or apparent attack. He will not be accountable for an error in judgment as to the amount of force necessary provided he acted reasonably and honestly.

Appellant's Appendix at 142. The trial court indicated that it would not give Solis's proposed instruction and stated that the information in the instructions it did plan to give the jury was sufficient to cover the issue of self-defense. The court's Instructions No. 18,³ No. 19, and No. 20, each given to the jury, related to self-defense.

³ Instruction No. 18 provided:

The defense of self-defense is defined by law as follows:

A person is justified in using reasonable force against another person to protect himself or a third person from what he reasonably believes to be the imminent use of

Solis argues that “[t]he given instructions on self-defense never informed the jury that the danger to Solis did not have to be actual or real,” that his proposed instruction was a correct statement of the law and was supported by the evidence, and that the instructions taken as a whole failed to properly instruct the jury about self-defense. Appellant’s Brief at 19. The State argues that Solis “is incorrect in his assertion that the trial court’s instructions to the jury on self-defense that the danger to [Solis] did not have to be actual or real” and that “[t]he instructions are replete with references to that the danger need not be actual, but merely apparently real and necessary.” Appellee’s Brief at 20. The State argues that the “proffered instruction was covered by the trial court’s instructions and was correctly rejected as redundant.” Id. at 21.

The manner of instructing a jury lies largely within the discretion of the trial court, and we will reverse only for abuse of discretion. Henson v. State, 786 N.E.2d 274, 277 (Ind. 2003). To determine whether a trial court abused its discretion by declining to give a tendered instruction, we consider: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence presented at trial to support giving the

unlawful force. A person is justified in using deadly force only if he reasonably believes that deadly force is necessary to prevent serious bodily injury to himself or a third person or the commission of a forcible felony.

However, a person may not use force if he is committing a crime or is escaping after the commission of a crime; he provokes a fight with another person, with the intent to cause bodily injury to that person; or he has entered into a fight with another person or started the fight, unless he withdraws from the fight and communicates to the other person his intent to withdraw and the other person nevertheless continues or threatens to continue to fight.

The State has the burden of disproving the defense of self-defense beyond a reasonable doubt. Before you may find the defendant guilty of the crime charged, you must find beyond a reasonable doubt that the defendant was not acting in self-defense.

instruction; and (3) whether the substance of the instruction was covered by other instructions that were given. Id.

We find that the substance of Solis's proposed instruction was covered by other instructions given by the court. Instruction No. 19 provided in part that "questions concerning the existence of imminent use of unlawful force, the necessity *or apparent necessity* of using force, as well as the amount of force necessary to repel an attack, can be determined only *from the standpoint of the defendant at the time* and under all existing circumstances."⁴ Appellant's Appendix at 190 (emphases added). Instruction No. 20 provided in part that "[w]hen all danger and *all apparent danger* of the loss of life . . . is at an end and passed" then the right to use force is at an end. Id. at 191 (emphasis added). Instruction No. 20 also informed the jury that Solis needed to "*honestly believe*

⁴ Instruction No. 19 provided in its entirety:

It is well settled that a defendant need only raise the issue of self-defense so that a reasonable doubt exists. The State then carries the burden of negating the presence of one or more of the necessary elements of self-defense:

- 1) that defendant was without fault;
- 2) was in a place where he had a right to be in relation to his alleged assailant; or
- 3) acted in reasonable fear or apprehension of death or great bodily harm.

The questions concerning the existence of the imminent use of unlawful force, the necessity or apparent necessity of using force, as well as the amount of force necessary to repel an attack, can be determined only from (sic) the standpoint of the defendant at the time and under all existing circumstance[s]. In the exercise of self-defense, the defendant is ordinarily required to act immediately, without time to deliberate and investigate.

Appellant's Appendix at 190.

and have reasonable ground to believe, when he makes use of force . . . [that] it was necessary to do so”⁵ Id. (emphasis added).

Based upon the final instructions given to the jury, we find that the court did not abuse its discretion by declining to give Solis’s proposed instruction to the jury. See Brown v. State, 738 N.E.2d 271, 275 (Ind. 2000) (holding that the trial court’s instructions adequately instructed the jury on self-defense, that the defendant’s tendered instruction would have been repetitive and was therefore unnecessary, and that the court did not abuse its discretion by refusing the defendant’s tendered instruction).

V.

The next issue is whether the court abused its discretion in sentencing Solis. We review the sentence for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490-491 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218 (Ind. 2007). A trial court abuses its discretion if it: (1) fails “to enter a sentencing statement at all;” (2) enters “a sentencing statement that explains reasons for imposing a sentence—including a finding of

⁵ Instruction No. 20 provided in its entirety:

A person in the exercise of the right of self-defense must act honestly and conscientiously.

When all danger and all apparent danger of the loss of life or of receiving great bodily harm from the assault of his assailant is at an end and passed, then the right to use force is at an end and should cease. The person exercising the right to self-defense must honestly believe and have reasonable ground to believe, when he makes use of force to protect himself or a third person from an assailant, that at the time he uses force it is then necessary to do so to protect his life, to protect his person, or protect a third party from great bodily harm.

One who is in no apparent danger and who apprehends no danger and who has no reasonable ground for such apprehension cannot kill or assault another and successfully interpose the defense of self-defense.

aggravating and mitigating factors if any—but the record does not support the reasons;” (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration;” or (4) considers reasons that “are improper as a matter of law.” Id. at 490-491. However, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id. at 491.

Solis argues that “[r]emorse is a proper mitigating factor,” that “[i]t is also an appropriate indicator of a defendant’s character,” that “while the age of the defendant is not a statutory mitigator, the courts have found that it is a significant mitigating factor,” and that “Solis’s childhood and abuse by both his father and step-father had undoubtedly contributed to the killing on May 3, 2009.” Appellant’s Brief at 22-23. The State argues that the court did not abuse its discretion, that the court properly did not find Solis’s remorse to be a significant mitigating factor, and that the court was well aware of Solis’s troubled family life but did not consider it a significant mitigator.

The determination of mitigating circumstances is within the discretion of the trial court. Rogers v. State, 878 N.E.2d 269 (Ind. Ct. App. 2007), trans. denied. The trial court is not obligated to accept the defendant’s argument as to what constitutes a mitigating factor, and a trial court is not required to give the same weight to proffered mitigating factors as does a defendant. Id. A trial court’s determination of a defendant’s remorse is similar to a determination of credibility. Pickens v. State, 767 N.E.2d 530, 534-535 (Ind. 2002). Without evidence of some impermissible consideration by the court, we accept its determination of credibility. Id. The trial court is in the best position

to judge the sincerity of a defendant's remorseful statements. Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied.

At the beginning of a statement he gave at the sentencing hearing, Solis stated that: "I would just like to state, start off like I'm really sorry what happened to [] Cavazos. I apologize – if it was my way, I wouldn't want nobody to get hurt, but I been shot and it's like literally when a bullet comes at you there's no time to think." Transcript at 903. Later in his statement, Solis stated: "I just wish nothing happened because death is something ugly And I'm sorry, Manny Martinez, to all the Martinezes" Id. at 904-905. The trial court was able to consider Solis's statement, and we cannot say that the trial court abused its discretion by not finding Solis's alleged remorse to be a mitigating circumstance. See Stout, 834 N.E.2d at 711 (addressing the defendant's argument that the trial court had overlooked his remorse as a mitigating factor and holding that the court did not err in not finding the defendant's alleged remorse to be a mitigating factor).

With respect to Solis's difficult childhood, the Indiana Supreme Court has noted that it "has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight." Coleman v. State, 741 N.E.2d 697, 700 (Ind. 2000), reh'g denied. At sentencing, Solis's counsel argued that the primary contribution of Solis's father to Solis's life was to get Solis involved in gang life, that Solis experienced physical and emotional abuse, and that he had been previously shot. In discussing Solis's prior contact with the criminal courts, the trial court noted Solis's "pattern of behavior" and stated: "That's not even talking about your family life or your life with your brother or your

dad's influence but just your pattern of behavior when courts are trying to give you a break and as a result you still keep on coming back" Transcript at 929. The trial court was not obliged to afford any weight to Solis's childhood history as a mitigating circumstance. We cannot say that the court abused its discretion by failing to identify or assign significant mitigating weight to Solis's difficult childhood. See Hines v. State, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006) (noting that the trial court was not obliged to afford any weight to the defendant's childhood history as a mitigating factor in that the defendant never established why his past victimization led to his current behavior and holding that the court did not abuse its discretion by failing to assign significant mitigating weight to the defendant's childhood abuse), trans. denied.

In addition, to the extent Solis argues that the trial court improperly assessed the weight to be assigned to his age, we note that the argument is, in essence, a request for this court to reweigh that factor, which we may not do. See Anglemeyer, 868 N.E.2d at 490-491.

VI.

The next issue is whether Solis's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that this court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

With respect to the nature of the offense, Solis argues that “[a]lthough Solis’s actions resulted in a tragic death, it does not appear that the nature of the offense elevated it beyond that typically found in such situations” and that “the trial court found that Solis acted under some provocation from the victim’s associates.” Appellant’s Brief at 21-22. In support of this argument, Solis points to the fact that the jury found that Solis acted under sudden heat and that evidence showed that “Solis and Elijah were chased and fired upon by some members of Cavazos’s group.” Id. at 21. With respect to his character, Solis argues that he apologized for the death, that his “prior criminal history was for non-violent offenses,” that he “was only 20 years old when the crime was committed,” and that from an early age he was “diagnosed with cognitive disabilities and a speech pathology” Id. at 22. Solis further argues that “[t]he principles of reformation will still be met and justice will still be served even if this Court revises the term of years to a lesser number closer to twenty (20) years imprisonment.” Id. at 23.

The State argues that “[t]he crime itself was horrific in its sudden violence and tragic aftermath for a man who was by all accounts not engaged in any violence and had his back to [Solis] and was laughing when he was hit by [Solis’s] bullet.” Appellee’s Brief at 22. The State points to the fact that the trial court noted that Solis had not been able to resist engaging in criminal behaviors and had not behaved well on probation subsequent to those prior crimes.

Our review of the nature of the offense reveals that Solis encountered the gathering of Martinez’s family and friends and ultimately pulled out his guns and shot

toward those congregated outside. One of Solis's shots struck Cavazos in the back of the neck and led to his death.

Our review of the character of the offender reveals that Solis was born in September 1989 and that the offense occurred in May 2009. Solis's social security disability records and records from a children's service related to speech pathology show that at a young age Solis had some impairment due to a neurological disorder and received therapy to address deficits in functional communication skills. Solis's father, who was a drug user and proclaimed gang member, introduced Solis to the gang lifestyle. As a juvenile, Solis was convicted of possession of marijuana and fleeing law enforcement and failed intensive probation and formal probation in connection with the disposition in those causes. As an adult, Solis was convicted of criminal mischief and ordered to complete additional community service hours in lieu of fines and fees.

After due consideration, we conclude that Solis has not sustained his burden of establishing that his sentence of thirty years is inappropriate in light of the nature of the offense and his character.

For the foregoing reasons, we affirm Solis's conviction and sentence.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.