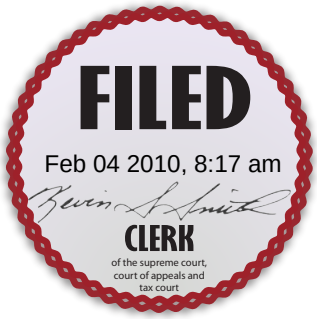
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

JAY A. RIGDON
ADAM D. TURNER
Warsaw, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ARTURO RODRIGUEZ, II
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAMES A. CARR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 25A04-0906-CR-356
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FULTON SUPERIOR COURT
The Honorable Wayne E. Steele, Judge
Cause No. 25D01-0611-MR-277

February 4, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

James Carr appeals his murder conviction. We hold that (1) Carr's proceedings did not violate the speedy trial provisions of Indiana Criminal Rule 4, (2) Carr's confession to law enforcement was not procured in violation of his *Miranda* rights, (3) the trial court did not err by prohibiting cross-examination into Carr's level of intoxication during his custodial interrogation, and (4) the court did not err by refusing to instruct the jury on various lesser-included offenses. We affirm.

Facts and Procedural History

Carr was fifty-eight years old and lived in Winamac, Indiana. Occasionally he worked as a cook at Denton's Corner Tavern in Monterey. Carr's mother lived on a farm in Kewanna, but at some point she moved into a nursing home. Carr was left to pay for and take care of her vacant property.

Carr had known a man named Roy Allen Shaffer for many years. One day Carr and Shaffer saw each other at the Corner Tavern. Shaffer was down on his luck and living in his car. Carr invited Shaffer to move into his mother's house and pay rent. Shaffer agreed.

Shaffer moved into the farmhouse. Carr also lent Shaffer his truck, helped him get a job, and assisted him financially. Soon, however, Shaffer began stealing things and lying to Carr. Shaffer also had a drinking problem.

On the afternoon of November 4, 2006, Carr went to the farm to sort through some old belongings. Shaffer was not home, so Carr waited for him to return. Carr had a couple of beers in the interim. Shaffer arrived at the house drunk. Carr and Shaffer soon

got into an argument in the kitchen. Carr was angry that Shaffer was lying and taking advantage of him, so he picked up his 16-gauge shotgun and cocked it. Shaffer said to "do it, do it, do it, do it." State's Ex. 86 p. 9. Carr pulled the trigger and shot Shaffer in the face.

Carr then drove to the Corner Tavern. Bartender Jan French and tavern owner Darlene Denton were both working that night. When they saw Carr, French and Denton noticed blood on his corduroy pants. French could also tell he had been drinking. At first French thought Carr had been involved in a car accident. She decided to drive Carr home in his van. Denton followed in her own car so that she could bring French back to the tavern afterward.

During the car ride home, Carr told French that he had shot Shaffer. He asked French not to tell anyone, and he said he was going to get an attorney and turn himself in. French dropped Carr off at his house. French and Denton returned to the Corner Tavern and called 911. Then they drove to the farm to look for Shaffer. They found him lying dead in a wheelbarrow in the backyard.

Police were dispatched to the farm. Officer Terry Engstrand was the first responder. He spoke to French and Denton before observing Shaffer's body. Law enforcement pronounced Shaffer dead at the scene. He had sustained a gunshot wound to the face. Police identified a bullet hole and blood stains in the home dining area. They also located a 16-gauge shotgun in the hallway and a shotgun slug on the bathroom floor. Law enforcement obtained a warrant to search Carr's residence, where they discovered

Carr's blood-stained corduroy pants. The blood was Shaffer's. Investigators also recovered a spent shell casing in Carr's pants pocket.

Carr was taken into custody and interviewed by Detective Daniel Pryor. The interview was videotaped. At various points during the interrogation, Carr said he felt he needed an attorney. Nevertheless, Carr chose to speak to Detective Pryor without the aid of counsel. Carr described what happened and admitted to Detective Pryor that he had shot Shaffer following the confrontation:

> Fact was that he was drunk and and and it just bothered me a great deal and I was drunk too so . . . well as we were talking I just finally said do I still have these guns? He had stolen the pistol from me and sold it to somebody else and I found out about that and I had asked him several times if he had seen that pistol and he had told me no. Finally it came out that he had taken it and sold it to somebody else and I was able to get it back . . . and I guess the bottom line was I just didn't trust him and then yesterday we were going through the whole thing, you know, and I just didn't trust him and I asked him about the guns whether he had sold those or not because he had sold a cookie jar of my mother's (inaudible) of personal belongings . . . and I had told him never to take things out of the house or selling things out of the barn things I had accumulated over the years. I was trying to . . . I have no idea how much money has taken in . . . I have no idea what he sold things for . . . and so and um . . [.] I picked up the gun and I was holding it. At one point I cocked it and looked at it and he said "do it, do it, do it, do it" and not the first time or the second time or the third time one of those times . . . finally, I did it.

Id.

The State charged Carr with murder on November 8, 2006. The information alleged that "[o]n or about November 4, 2006, in Fulton County, State of Indiana, James A. Carr did knowingly or intentionally kill Roy Allen Shaffer by shooting Roy Allen Shaffer in the head with a shotgun." Appellant's App. p. 13.

Trial was initially set for March 21, 2007, but the parties moved for a series of continuances over the next two years. In February 2009 Carr moved for discharge under Indiana Criminal Rule 4(C), arguing that delays in the proceedings had violated his rights to a speedy trial. The trial court denied the motion.

Carr was brought to trial on April 27, 2009. The defense moved to suppress Carr's videotaped confession. The defense argued that Carr had invoked his right to counsel at the beginning of the interview and that Carr's intoxication rendered his statements involuntary. The court admitted the confession over objection.

The defense tendered final instructions on involuntary manslaughter, criminal recklessness, and battery. The trial court denied the defense's requests, finding "no serious evidentiary dispute over the element or elements that distinguish the crime charged from those less[e]r included . . . ." Tr. p. 732. Carr was found guilty of murder. He now appeals.

Discussion and Decision

Carr raises four issues: (I) whether delays in his proceedings violated the speedy trial provisions of Indiana Criminal Rule 4, (II) whether his confession to law enforcement was procured in violation of his *Miranda* rights, (III) whether the trial court erred by prohibiting cross-examination about his level of intoxication during interrogation, and (IV) whether the trial court erred by refusing to instruct the jury on lesser-included offenses.

I. Motion for Discharge under Criminal Rule 4

Carr first argues that delays in his proceedings violated the speedy trial provisions of Indiana Criminal Rule 4. This timeline summarizes the pertinent events leading up to Carr's trial:

November 8, 2006:	The State files its charging information. Trial is set for March 21, 2007.
February 22, 2007:	The defense and the State jointly move for a continuance. Trial is reset for August 20, 2007.
April 23, 2007:	The defense sends a letter to the prosecution requesting the autopsy report.
May 11, 2007:	An autopsy is completed by the State's forensic pathologist.
May 18, June 5, and June 26, 2007:	The defense sends additional letters to the prosecution requesting the autopsy report and the location of the firearm.
August 6 or 7, 2007:	The prosecution receives the autopsy report and forwards it to defense counsel.
August 6, 2007:	The defense moves for a continuance with delay charged to the State.
August 8, 2007:	At the motion hearing, counsel says that "we have been looking for the autopsy report in this case for some period of time. [The prosecutor] evidentially [sic] received this on the 6th and immediately forwarded it to my office and as I was concerned, when we first started addressing this, there are items within the autopsy report that need evaluation. Perhaps we may need to get an expert depending on what this guy is actually saying. . . . This is our continuance and therefore the delay be charged to the defendant." *Id.* at 54. The Chronological Case Summary (CCS) states, "Motion to Continue with delay Charged to State

	withdrawn." Appellant's App. p. 5. The court selects March 18, 2008 as the first trial setting and January 22, 2008 as the second trial setting.
November 7, 2007:	The defense moves for another continuance. Defense counsel explains, "I am a recent imprint into this case . . . . I've talked to [co-counsel] as recently as this morning about this case, and we're certainly engaged in it. We need to do some more homework. It is our anticipation we are going to be employing a, a forensic pathologist to help us with this case. We, [co-counsel], at least, has had some preliminary discussions with a forensic pathologist but he has not had the materials to review or has not technically been employed by us yet and that's gonna take some time to get that. . . . [Co-counsel] advised me that he starts a capital murder case March 17th which as the Prosecutor pointed out is probably not likely to be done in one (1) day. So, the bottom line is that we are asking the Court to continue the dates of those trials. I've spoken with my client about that and while he needs, wants and needs to get this resolved, he understands. . . ." Tr. p. 62. Trial is reset for May 6, 2008.
April 10, 2008:	The defense moves for a continuance. Trial is reset for September 16, 2008.
June 23, 2008:	The court on its motion resets trial for September 23, 2008.
August 28, 2008:	The State moves for a continuance due to the unavailability of witnesses.
September 3, 2008:	The State's motion is granted. Trial is reset for October 15, 2008.
October 1, 2008:	The defense moves for a continuance. A hearing is set for February 24, 2009.

February 5, 2009:	The defense moves for discharge on speedy trial grounds. The court denies the motion following a hearing.
February 10, 2009:	The defense moves for a continuance. Trial is reset for April 27, 2009.
April 27, 2009:	Trial begins.

Carr argues that the State was responsible for over a year's worth of delays and that the trial court erred by denying his motion for discharge.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." Article 1, Section 12 of the Indiana Constitution also guarantees that "[j]ustice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." Indiana Criminal Rule 4(C) implements defendants' speedy trial rights by establishing time deadlines by which trials must be held. *Dean v. State*, 901 N.E.2d 648, 652 (Ind. Ct. App. 2009), *trans. denied*. The rule reads in part:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar . . . .

Ind. Crim. Rule 4(C). Rule 4(C) provides that a defendant may not be held to answer a criminal charge for greater than one year unless the delay is caused by the defendant, emergency, or court congestion. *Pelley v. State*, 901 N.E.2d 494, 497 (Ind. 2009), *reh'g denied*. The one-year period commences with the date of arrest or filing of information, whichever is later. *Isaacs v. State*, 673 N.E.2d 757, 762 (Ind. 1996). If a defendant seeks

or acquiesces in a delay that results in a later trial date, the time limitation imposed by the speedy trial rule is extended by the length of the delay attributable to the defendant. *Ford v. State*, 706 N.E.2d 265, 267 (Ind. Ct. App. 1999), *trans. denied*. When a defendant requests a continuance, the time between the motion for a continuance and the new trial date is chargeable to the defendant. *Vermillion v. State*, 719 N.E.2d 1201, 1204 (Ind. 1999). Where the court continues trial on its own motion, but the record does not show the basis for the continuance, any resulting delay is attributable to the State. *See Isaacs*, 673 N.E.2d at 762-63. In addition, the court will not charge the defendant with any delay resulting from the State's failure to respond to discovery requests. *Id.* at 762 (citing *Biggs v. State*, 546 N.E.2d 1271, 1274-75 (Ind. Ct. App. 1989)). To put the defendant in a position whereby he must either go to trial unprepared due to the State's failure to respond to discovery requests or be prepared to waive his right to a speedy trial, is to put the defendant in an untenable situation. *Marshall v. State*, 759 N.E.2d 665, 670 (Ind. Ct. App. 2001).

Carr was charged on November 8, 2006. The State's clock began to run on that date. The State and defense filed a joint motion for continuance on February 22, 2007. This initial 106-day period between November 8, 2006, and February 22, 2007, was chargeable to the State. But since Carr joined in the first continuance motion, the State was not accountable for the ensuing delay. The defense then moved for a series of continuances. On June 23, 2008, the trial court on its own motion reset trial from September 16 to September 23. The record does not reflect that this continuance was due to court congestion or emergency, so these seven days are attributable to the State. The

State also moved for a continuance on August 28 due to the unavailability of witnesses, and the court reset trial from September 23 to October 15. The State was accountable for those twenty-two days as well. All other continuance requests in this case were made by the defense. Accordingly, only three time periods are chargeable to the State: the 106 days between November 8, 2006, and February 22, 2007, the seven days between September 16 and September 23, 2008, and the twenty-two days between September 23, 2008, and October 15, 2008. The State was therefore responsible for only 135 days' delay, well short of Rule 4(C)'s one-year limitation.

Carr nonetheless argues that his August 6 and November 7, 2007, continuance motions were prompted by the prosecution's failure to forward discovery, and that the corresponding delays should be charged to the State. With regard to the August 6 request, defense counsel initially moved for any delay to be charged to the State. But at the motion hearing counsel said that "[t]his is our continuance and therefore the delay be charged to the defendant." The CCS reflects that the motion for delay to be charged to the State was withdrawn. Since counsel ultimately asked for the continuance to be charged to the defense, he cannot now complain that the delay was attributable to the State. Moreover, even if the State was responsible for the ensuing delay, the period between August 6, 2007—the date of the continuance motion—and November 7, 2007—the date of the defense's next continuance motion—totals only 93 days. That brings the State's tally to 228 days, which is again well within the 4(C) limitation. And as for the November 7 request, defense counsel did not invoke discovery violations as a basis for that continuance motion. Counsel explained that "I am a recent imprint into this case,"

"[w]e need to do some more homework," the defense's forensic pathologist "has not technically been employed by us yet," and co-counsel "starts a capital murder case March 17th which as the Prosecutor pointed out is probably not likely to be done in (1) day." The reasons for the continuance, in other words, were defense counsel's own scheduling conflict and its need to do more work on the case. For these reasons, both continuances in question were properly charged to the defense. *Cf. Marshall*, 759 N.E.2d at 670 (charging continuances to the State, where the defense filed multiple discovery requests, defense asked for continuances based on discovery delays, and CCS entries and pleadings "consistently attribute[d] . . . delays to the State's failure to provide discovery"); *Biggs*, 546 N.E.2d at 1275 (charging delay to the State, where the defense's continuance motion requested "that the trial be delayed until such time as the defendants' discovery requests were complied with by the State, so that the defendants would be adequately prepared for trial"); *Isaacs*, 673 N.E.2d at 762 (charging delay to the State, where the defendant "moved for a continuance because the State had not complied with [his] discovery requests"); *see also Cole v. State*, 780 N.E.2d 394, 397 (Ind. Ct. App. 2002).

In light of the foregoing, Carr's proceedings complied with Rule 4(C), and the trial court did not err by denying his motion for discharge.

II. Admission of Confession

Carr next argues that the trial court erred by admitting his videotaped confession. Carr argues that the confession was procured in violation of his *Miranda* rights. Detective Pryor's interrogation proceeded as follows:

[DET. PRYOR]	How you doing Mr. Carr?
[CARR]	I'm Jim

[DET. PRYOR] Jim. I didn't want to be disrespectful . . .
[CARR] That's fine.
[DET. PRYOR] I'm Dan Prior, I'm the detective at the Sheriff's Office
[CARR] Sure, sure . . .
[DET. PRYOR] Do you smoke by chance?

* * * * *

[CARR] Ah, Mr. Pryor I want to be cooperative because, but at the same point I'm in a situation where I feel like, I, I really need an attorney to, you know, to talk with, and for me.
[DET. PRYOR] Well, you're absolutely entitled to that sir . . .
[CARR] I understand that . . [.]
[DET. PRYOR] That's no offense taken, you're in the . . . I'm not going to violate your rights (inaudible) that way. The only reason I was in here, we know what happened, that's not why I was in here, I just wanted to know why. It might not be as bad as it appears, but only you know those circumstances, but you're entitled to an attorney and I'm not going to
[CARR] Yeah, OK. Well I mean ask me, ask me what you want to ask me.
[DET. PRYOR] Well I mean that's up to you.
[CARR] No, I'll, I mean
[DET. PRYOR] I, I mean I have to read you your rights because you're in custody (inaudible)
[CARR] Right, right
[DET. PRYOR] I want to do things by the book.
[CARR] Right.
[DET. PRYOR] Like I said, things look bad but they're not always as they look . . . and ah . . .
[CARR] Well
[DET. PRYOR] That's the main thing is
[CARR] Well, believe me it's bad, you know what I mean? It's bad.
[DET. PRYOR] Well, I mean I won't lie to you Jim, it doesn't look good. But like I say, it may look worse than what it actually is. That's why I'm here in fairness
[CARR] OK
[DET. PRYOR] There's more than one side to things, there's more than one way that things look.
[CARR] Right
[DET. PRYOR] And ah,

[CARR] Well, are you able to tell me how they look?

* * * * *

[DET. PRYOR] Before I ask you any questions I'd like to advise you of your rights. You have the right to remain silent. Anything you say can be used against you in Court or any other proceeding. You have the right to consult with an attorney before making any statement or answering any questions. If you can't afford a lawyer one will be appointed for you. You understand all those rights? Ok. Right here where it says signature, you sign that it means I read them to you and you understand them.

[CARR] Sure, sure.

[DET. PRYOR] Not an admission of anything.

[Carr signed a form acknowledging that he was advised of his rights.]

* * * * *

[DET. PRYOR] Like I said Jim things looks bad I won't lie to you based on what it looks like it looks like murder. Ok? It may not be that. There[']s different degrees of things. Ok? Like I say only person that knows the circumstances as to why things happened would be yourself.

[CARR] Uh-uh.

[DET. PRYOR] Ok? And uh if it[']s not what it looks like we certain[]ly don't want things to be more severe than what they really are. We want to be fair.

[CARR] Well and I do with you and I do understand what's happened you know and and . . . uh . . .

* * * * *

[DET. PRYOR] Like I said I'm not the bs-ing kind of guy ok I'm straight with you, I'm straight with anybody I talk to. What good does bs-ing people do, nothing. This isn't a game.

[CARR] And I know it's not a game I mean I understand what's happened and that's why, that's why I feel as though, you know, I need to have an attorney to deal with

because this is a serious thing, you know, it's a very serious thing, I know it's a very serious thing.

[DET. PRYOR] Yes sir I understand. And I won't question you . . . I'm just throwing this out here and you've asked for an attorney and you're entitled to it.

[CARR] OK. Well, can I have a cigarette?

[DET. PRYOR] Yes you can still have a cigarette.

[CARR] Thanks a lot.

[DET. PRYOR] Those aren't meant to get you to talk to me.

[CARR] I know.

[DET. PRYOR] I'm a smoker. My point, my point is this . . . there's a difference between murder, something that murder kind of embodies, someone planned something and then there's lesser degrees of that so . . .

[CARR] I'll just tell you straight out that there was no plan. No plan whatsoever . . . none. And I . . . . The weapon that was used is a uh . . . are we on, we're on camera? Right?

[DET. PRYOR] Yes sir we are. I didn't mean to . . . that's just standard procedure it's not . . .

[CARR] That's fine, that's fine. I questioned Alan . . . yes I um . . .

[DET. PRYOR] I'm sorry I didn't[] mean to mess you up but you said something about a lawyer I don't want to . . [.]

[CARR] OK, alright . . [.]

[DET. PRYOR] . . . you have the right to tell me you don't want that but I don't want to . . .

[CARR] Well I want, I want to tell you that it was not a planned situation.

[DET. PRYOR] Ok.

[CARR] Ok? And uh the weapon that was used is my gun. And uh, Alan had, had . . [.] he's been stealing things from me for quite some time. And I just questioned him about whether or not I still had a .22 that was there at the house and I'm sure you've been there. And also my .16 gauge. Now he had told me, at one point, that all the shells for the .16 gauge were inoperable ok? [A]nd uh . . . I was angry with him and I was asking him about that and he brought them out and, uh . . . And uh, . . . All I'm telling you is that it was not a planned thing. That he brought them out and put them in front of me and we were angry . . . well I was angry with him I don't know if he was angry with me or not I have no idea so . . . other than that I got, really I just

feel like in this situation as serious as it is that I need to consult an attorney before I say anything more.

[DET. PRYOR] And I respect that and it[']s your right. Part of what you just told me you wanted to tell me without the lawyer?

[CARR] Right, exactly.

[DET. PRYOR] And the reason I ask is I'm trying to be fair from both ways here . . .

[CARR] Right. Well you said, you know, I mean that it looked like it had been something planned and there was nothing planned and I tell you I have been angry with him many, many times, you know . . . but uh . . .

[DET. PRYOR] You freely . . . .

[CARR] I did say that, yes . . [.]

[DET. PRYOR] You wanted to tell me that . . [.]

[CARR] Of my own volition . . [.]

[DET. PRYOR] You wanted to tell me that without the lawyer. I didn't

[CARR] Yeah . . [.]

[DET. PRYOR] Coerce you in any way, I want to be fair to both . . [.]

[CARR] Other than that, just that the weapon was provided, it was not, you know, I did not bring it with me . . . I did not think about . . . I had no thoughts of that whatsoever.

[DET. PRYOR] That's all you're comfortable with talking about now?

[CARR] Right now, yeah. Do you have any idea how long it will be before I can see an attorney?

[DET. PRYOR] Uh, the jailor will be able to help you with that. I mean you're entitled to a phone call you're entitled to those things and like I said I respect your constitutional rights and we won't go any further as far as interviewing or asking questions.

[CARR] Ok then. I appreciate that thank you very much.

* * * * *

[CARR] Now, you know I've watched enough LAPD and Blue and all that kind of stuff. Now if we do talk I mean what happens? I mean I don't want to 'lawyer up' as they say, you know. I mean, I just like I say this is a serious thing, you know it's a serious thing.

[DET. PRYOR] Yes we both know that, we're both grown adults.

[CARR] Right exactly, exactly.

[DET. PRYOR] There's no place to BS.

[CARR] And uh, you know . . [.] well . . [.]

[DET. PRYOR] I mean you're curious as to what would happen if you wanted to talk? But then again you have to voluntarily make that decision I don't want to coerce you in anyway to make any decisions.

[CARR] Well why don't we do it this way. Go ahead an[d] ask me questions and if I feel comfortable telling you I will tell you. You know . . .

[DET. PRYOR] Ok. That's fair enough. You're freely saying that you don't want a lawyer right now, you're willing . . [.]

[CARR] I'm willing to answer questions, you know, up to a point I suppose. You know . . . I started out in law school you know, but didn't make it. But anyway . . . it[']s late at night I'm tired . . .

[DET. PRYOR] Yes sir I understand that . . . . well late to most of us folks . . . um, like I said it[']s apparent what happened here. The man was shot.

[CARR] Yes he was.

[DET. PRYOR] At that house. Where the activity took place?

[CARR] Yes.

[DET. PRYOR] If, if you're willing to share with me I guess . . . I'll put it this way, would it be easier for you, would it be easier for you if you, just tell me with what you're comfortable, what you're willing to tell me and we'll leave it at that right now. Would that, would that be easier Jim?

[CARR] Well Dan I'm not sure. You know, I mean, I want to be cooperative with you . . . but, you know, as I said earlier I'm in a serious situation.

[DET. PRYOR] Right. I understand. I mean what I was thinking it might be easier because you know the things that you're willing to answer. Maybe you could just . . . if it would be easier for you and me to just tell me that information and then whatever you're comfortable with . . .

State's Ex. 86 p. 1-9. Carr then explained to Detective Pryor the circumstances surrounding the murder in greater detail.

[DET. PRYOR] Sounds like there's a lot there

[CARR] Seriously

[DET. PRYOR] Well, I mean.

[CARR] Go ahead and ask me questions.

[DET. PRYOR] Well . . .

> [CARR] I mean I'll waive the attorney right and I'll just go ahead and talk with you about this because of (inaudible).

Id. at 11.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Accordingly, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and the police must explain this right to him before questioning begins. *Id.* at 469-73.

If a suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. *North Carolina v. Butler*, 441 U.S. 369, 372-76 (1979). When a suspect asserts his right to counsel during custodial questioning, the police must stop until counsel is present or the suspect reinitiates communication with the police and waives his right to counsel. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

Invocation of the *Miranda* right to counsel following an initial waiver requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney. *Davis v. United States*, 512 U.S. 452, 459 (1994). "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the

suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* Rather, the suspect must unambiguously request counsel. *Id.* For example, the remark, "maybe I should talk to a lawyer" does not qualify as an unequivocal invocation. *Id.* at 462. But our own Supreme Court has held that the statement "Well, I feel like I ought to have an attorney around" is sufficient to invoke the right to have counsel present. *Sleek v. State*, 499 N.E.2d 751, 754 (Ind. 1986).

Carr first told Detective Pryor, "I want to cooperate because, but at the same point I'm in a situation where I feel like, I, I really need an attorney to, you know, to talk with, and for me." Carr said that he felt like he needed an attorney, as did the defendant in *Sleek*, but at the same time Carr expressed a desire "to cooperate." We cannot say Carr's statement was an unequivocal invocation of the right to counsel. To the contrary, Carr was "equivocating" in the plainest sense of the word. He went on to instruct Detective Pryor, "Well I mean ask me, ask me what you want to ask me." After being Mirandized, Carr told Detective Pryor, "I feel as though, you know, I need to have an attorney to deal with because this is a serious thing, you know, it's a very serious thing, I know it's a very serious thing." Thereafter, Carr proceeded to volunteer that "there was no plan." Carr said, "I want to tell you that it was not a planned situation." Even later Carr informed Detective Pryor, "I mean I don't want to 'lawyer up' as they say . . . ." And again he instructed, "Go ahead an[d] ask me questions and if I feel comfortable telling you I will tell you." "I'm willing to answer questions, you know, up to a point I suppose."

Based on these statements, we conclude that Carr did not unambiguously assert his right to counsel during the interrogation. His confession was therefore not procured in

violation of *Miranda* and *Edwards*, and the trial court did not err by admitting the confession at trial.

III. Cross-Examination About Intoxication During Interrogation

Carr next argues that the trial court erred by prohibiting cross-examination of Detective Pryor about Carr's level of intoxication during the custodial interrogation. The State called Detective Pryor twice at trial. When Detective Pryor was called the first time, the defense cross-examined him in pertinent part:

> Q Did you, at any time, give any kind of blood alcohol test to Mr. Carr?
> A No I did not.
> Q Okay. Did Officer Engstrand give any kind of blood alcohol test to Mr. Carr?
> A Not to my knowledge.
> Q Are you acquainted with a device called a PBT?
> A Yes I am.
> Q What is that?
> A It's a portable breath test.
> Q Do most officers carry that in the car and it's used routinely during traffic stops where there's, may be a subject that's possibly intoxicated?
> A PBTs are carried by patrol officers yes and they are, they are used in, in DUI stops and things of that nature.
> Q Do you have one?
> A I'm sorry?
> Q Did you have one that night?
> A Don't recall if I had one that night or not. I did have one issued to me, yes.
> Q Did Officer Engstrand have one with him to your knowledge?
> A I didn't look personally, but I would assume so, yes (laughter).
> Q Would the state of intoxication of Mr. Carr been important?
> A I'm sorry?
> Q Would the state of Mr. Carr's intoxication have been important in this investigation?
> A If I would've personally observed something based on my training and experience which would've led me to believe that he was severely impaired or, or noticeably intoxicated, I probably would've investigated that further, correct.

Q Did Officer Engstrand tell you that Ms. Denton had told him that she thought he had gone in the house, fallen down cause he was that drunk?
A I don't recall falling down and I don't recall that terminology, no (laughter).

* * * * *

Q Did you make a direction about having Mr. Carr taken to the Fulton County Sheriff's office?
A Yes. As I recall, I asked Deputy Engstrand once he was taken into custody to transfer or bring Mr. Carr back to the, to the sheriff's department.
Q Did you ask anybody to do a blood alcohol test on Mr. Carr?
A No I did not.

Tr. p. 423-25. Later in the trial, the State called Detective Pryor to authenticate Carr's confession. The State first offered into evidence the "Statement of Rights" form which Carr had signed during the interrogation. The defense promptly asked to voir dire the witness. The defense questioned Detective Pryor in open court as follows:

Q Officer Pryor, the, this document has a date of November 5th, 2006 and a time of 1:57 a.m. Would you assume that that was about the time that the interview with Mr. Carr would've started?
A The time and date on there would reflect and I don't know what time device, but that would reflect when I read him his rights.
Q Okay.
A About that time, yes.
Q And that was done at or near the beginning of your interview with him?
A Yes that was done during the interview, I'm not, I didn't walk right in the door and immediately read this, no sir.
Q I understand. But it wasn't the last thing you did either?
A No sir.
Q Okay. It was some, somewhere towards the beginning?
A Yes I would believe that's accurate.
Q Now you had had information before you came into that room to speak with Mr. Carr about his consumption of alcohol had you not?

[STATE] Judge, I guess this goes way beyond the admission of this Exhibit.

THE COURT: I'll, I'll sustain that.

[DEFENSE] Well, if I could just respond your Honor. Our position is that our client was in no position to give a voluntary waiver of rights under his circumstances and I was just exploring that issue.

[STATE] Well, that's . . .

THE COURT: Well, I'll still sustain it. I understand then, you'll be given that opportunity but for this particular Exhibit at this particular time.

Id. at 677-78. The State then offered Carr's videotaped confession and its transcript. The defense again requested to voir dire the witness. This time the trial court excused the jury. The defense questioned Detective Pryor as follows:

Q Officer Pryor, before you began your interview with Mr. Carr, you had had some information, had you not, about his consumption of alcohol that prior evening?
A There had been statements by others that that's what they had observed or what they believed, yes sir.
Q And do you recall who those others were?
A I believe Jan French was one, and I believe Darlene Denton . . .
Q Okay
A . . . had indicated that they, that he had been drinking.
Q And that was in conversations they had with you?
A Yes initially at the scene, I believe that's, that topic come 'sic' up there first.
Q Can you're, you're at least aware now that they also then repeated that information to offer 'sic', Officer Engstrand when they, when he interviewed them at the jail?
A Yes. It's my recollection that information has, has been stated here in the courtroom also.
Q And did he relay that information to you prior to this interview with our client?
A Don't independently recall whether I spoke to Deputy Engstrand about that, those specific interviews here at the jail prior to me speaking to the, the defendant.
Q And you're aware that the, well, after the, was it after the interview that Mr. Carr was booked into the jail?
A Yes after consultation with the Prosecutor, I was advised to charge him and hold him on a charge of murder.
Q And you're aware that the booking information indicates that Mr. Carr at the time when he was booked anyway, was intoxicated?
A I don't independently recall that.
Q Well if I were to tell you that, who is Bruce Baker?

A Bruce Baker is an ex-sheriff who is now a jailer.
Q And if I were to tell you that Bruce Baker indicates that the book infor 'sic', information says that Mr. Carr was intoxicated at the time, you have any reason to doubt that?
A I'd like to see the document but I have no reason to believe that Bruce Baker would, would tell a falsehood.
Q Okay.
A Based on my experience (laughter).
Q Okay.
A Whether I would concur with that observation or not would be a different matter.

Id. at 681-83. At this point the defense renewed its suppression motion, arguing that Carr was intoxicated during the interrogation and that his statements were involuntary. The trial court denied the motion. The trial court reseated the jury, and the videotaped confession was played in court. The defense did not seek permission to question Detective Pryor about Carr's level of intoxication for the reseated jury.

Carr argues that he should have been "permitted to question Detective Dan Pryor about the Defendant's apparent level of intoxication. . . . Signs of intoxication would go not just to the admissibility of the evidence, but to the weight that should be given to it." Appellant's Br. p. 16-18. To be admissible, a suspect's confession must be voluntarily given. *Carter v. State*, 686 N.E.2d 1254, 1258 (Ind. 1997). A confession is voluntary if it is the product of a rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will. *A.A. v. State*, 706 N.E.2d 259, 262 (Ind. Ct. App. 1999). Under the United States Constitution, the State must prove by a preponderance of the evidence that the defendant's confession was voluntary. *Clark v. State*, 808 N.E.2d 1183, 1191 (Ind. 2004). Under the Indiana Constitution, when the defendant challenges the admissibility

of a confession, the State must show voluntariness beyond a reasonable doubt. *Id.* The voluntariness of a defendant's confession is determined from the totality of the circumstances. *Washington v. State*, 808 N.E.2d 617, 622 (Ind. 2004).

In addition, the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The purpose of the Sixth Amendment right of confrontation is to ensure that the defendant has the opportunity to cross-examine the witnesses against him. *Howard v. State*, 853 N.E.2d 461, 465 (Ind. 2006). The right to adequate and effective cross-examination is fundamental and essential to a fair trial. *Id.* "It includes the right to ask pointed and relevant questions in an attempt to undermine the opposition's case, as well as the opportunity to test a witness' memory, perception, and truthfulness." *Id.*

To the extent Carr alleges he was deprived the opportunity to question the witness to challenge the voluntariness of the confession, the last colloquy cited above shows otherwise. The defense asked Detective Pryor a series of questions about Carr's possible intoxication during interrogation, and then it renewed the motion to suppress. Carr was provided a full opportunity to question Detective Pryor and challenge the voluntariness and admissibility of the videotaped statements. To the extent Carr alleges he was not allowed to confront the witness about intoxication to challenge the weight of the confession before the jury, we cannot say that Carr was deprived of that opportunity either. The trial court cut off the defense's voir dire at one point only because Carr's counsel was questioning the witness for the purpose of making an objection to the

"Statement of Rights" form. The trial court informed Carr's counsel that he would be given an opportunity to further question the detective respecting Carr's alleged intoxication at another time. The State then proffered the videotape and transcript, the jury was excused for a voir dire on the admissibility of Carr's statements, and the trial court denied the motion to exclude. The defense could have sought permission to ask its questions again in open court, but it apparently declined to do so. We also observe that the defense discussed Carr's potential intoxication in front of the jury when Detective Pryor took the stand the first time.

In conclusion, the trial court did not prohibit Carr from eliciting evidence of his intoxication to challenge the admissibility or weight of the confession. We thus find no error.

IV. Instructions on Lesser-Included Offenses

Carr finally argues that the trial court erred by refusing to instruct the jury on various lesser-included offenses. "A requested instruction for a lesser included offense of the crime charged should be given if the lesser included offense is either inherently or factually included in the crime charged, and if, based upon the evidence presented in the case, there existed a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense such that a jury could conclude that the lesser offense was committed but not the greater." *McKinney v. State*, 873 N.E.2d 630, 644 (Ind. Ct. App. 2007) (quoting *Ellis v. State*, 736 N.E.2d 731, 733 (Ind. 2000)), *trans. denied*. When the trial court makes a finding that a serious evidentiary dispute does not exist, we will review that finding for an abuse of discretion. *Brown v. State*, 703 N.E.2d

1010, 1019 (Ind. 1998). If the trial court rejects the tendered instruction on the basis of its view of the law, as opposed to its finding that there is no serious evidentiary dispute, appellate review of the ruling is de novo. *Id.* Here the trial court found that no serious evidentiary dispute existed. We therefore review its finding for an abuse of discretion.

To determine whether an offense is inherently included in a charged crime, the court compares the elements of the two relevant statutes. *Hauk v. State*, 729 N.E.2d 994, 998 (Ind. 2000). The requested lesser-included offense is inherently included in the charged crime if (a) the parties could establish commission of the claimed lesser-included offense by proof of the same material elements or less than all of the material elements of the charged crime or (b) the only feature distinguishing the claimed lesser-included offense from the charged crime is that a lesser culpability is required to establish commission of the lesser-included offense. *Id.* Even if it is not inherently included, it is possible for the lesser offense to be factually included in the charged offense under specific circumstances. *Wright v. State*, 658 N.E.2d 563, 566-67 (Ind. 1995). A factually included offense is found when the charging information alleges that the means used to commit the crime charged include all of the alleged lesser-included offense. *Id.* at 567.

Carr was charged with murder. The elements of murder are (1) the knowing or intentional (2) killing (3) of another human being. Ind. Code § 35-42-1-1. The information in this case alleged specifically that "[o]n or about November 4, 2006, in Fulton County, State of Indiana, James A. Carr did knowingly or intentionally kill Roy Allen Shaffer by shooting Roy Allen Shaffer in the head with a shotgun."

Carr sought instructions on Class C felony battery and involuntary manslaughter. A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery. Ind. Code § 35-42-2-1(a). Battery is a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon. *Id.* § 35-42-2-1(a)(3). A person who kills another human being while committing or attempting to commit battery commits involuntary manslaughter. *Id.* § 35-42-1-4(c). It is well established that "involuntary manslaughter is not an inherently included lesser offense of murder." *Roberts v. State*, 894 N.E.2d 1018, 1029 (Ind. Ct. App. 2008), *trans. denied*. However, it may be a factually included lesser offense if the charging information alleges that a battery accomplished the killing. *Ketcham v. State*, 780 N.E.2d 1171, 1177 (Ind. Ct. App. 2003). Killing an individual by shooting him with a gun is necessarily accomplished by touching someone in a rude, insolent, or angry manner. *Id.* at 1177-78. The charging information in this case alleged that Carr killed Shaffer "by shooting [him] in the head with a shotgun." The information therefore alleged a battery, and involuntary manslaughter was a factually included lesser offense of murder. For the same reason, we find that battery was factually included lesser offense as well.

Carr also sought an instruction on criminal recklessness. Criminal recklessness occurs when a person knowingly, recklessly, or intentionally inflicts serious bodily injury on another. Ind. Code § 35-42-2-2(d)(1). In effect, criminal recklessness occurs when there is a (1) reckless, knowing, or intentional (2) infliction of a (3) serious bodily injury—including (4) death on another person. *Miller v. State*, 720 N.E.2d 696, 703 (Ind.

1999). Culpability remains the sole distinguishing element, and as such, makes criminal recklessness an inherently lesser-included offense of murder. *Id.*

We next must determine whether a serious evidentiary dispute existed concerning the element distinguishing murder from the other crimes—intent to kill—whereby the jury could have concluded that Carr committed involuntary manslaughter, battery, or criminal recklessness but not intentional murder. Here there is no dispute that Carr grabbed a firearm, pointed it directly at Shaffer's head, and shot Shaffer in the face at very close range. Carr admitted to Detective Pryor, "At one point I cocked it and looked at it and [Shaffer] said 'do it, do it, do it, do it' and not the first time or the second time or the third time one of those times . . . finally, I did it." Based on this evidence, the trial court was warranted in finding no serious evidentiary dispute that Carr knowingly or intentionally killed Shaffer. *See, e.g.*, *Sanders v. State*, 704 N.E.2d 119, 122-23 (Ind. 1999) ("Sanders himself presented evidence that, as he stood at the bottom of the stairs, he aimed at and shot the person descending toward him. . . . There was no serious evidentiary dispute that Sanders knowingly shot Rodriguez, because Sanders must have known that firing directly at a person at such close range is highly probable to result in death."); *Wadsworth v. State*, 750 N.E.2d 774, 776 (Ind. 2001) ("Wadsworth must have known that firing directly at a person at such close range is highly probable to result in death."); *Morgan v. State*, 759 N.E.2d 257, 263-64 (Ind. Ct. App. 2001) ("Morgan does not dispute the evidence that he donned a mask, approached Davis from behind, walked up to him, and shot him. We accordingly decline to find a serious evidentiary dispute that Morgan knowingly killed Davis.").

We conclude that the trial court did not abuse its discretion in refusing the tendered instructions.

Affirmed.

RILEY, J., and CRONE, J., concur.