ATTORNEY FOR APPELLANT:

JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE DONGIEUX WIGGINS
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

LAWRENCE E. BROWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0908-CR-732
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kurt M. Eisgruber, Judge
Cause No. 49G01-0809-FA-204873

June 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Lawrence Brown was convicted of voluntary manslaughter, a Class A felony.[1] He argues the trial court abused its discretion by declining to instruct the jury on self-defense and involuntary manslaughter. We affirm.

FACTS AND PROCEDURAL HISTORY

Brown shared a residence with his brother, Bobby Clark. On September 2, 2008, Clark and Brown argued over money Clark's former girlfriend owed Brown. During the dispute, Clark hit Brown on the jaw. Brown stumbled into the kitchen. He was concerned that Clark would hit him again. He picked up a knife in the kitchen and stabbed Clark twice, once in the chest and once in the forearm. Clark fell into a nearby chair in the living room. Brown called 911 and reported he had stabbed his brother. He made the same statement to the responding EMT. Clark died from the stab wound to his chest.

Brown admitted stabbing his brother, but testified at trial he did not do so knowingly or intentionally. He said he found out he had stabbed his brother when, standing face to face with him, his brother said, "[O]h, you stabbed me." (Tr. at 203.) Brown claimed he looked at his hand, saw the knife, and realized only then that he had stabbed his brother. He said he had no intention to stab him at all, much less in the heart. He said he thought he had stabbed him in the belly. Brown testified that he and his brother got along pretty well. He said, "I did not mean to stab my brother. I love my brother. I wouldn't stab him." (*Id*. at 199.)

[1] "A person who knowingly or intentionally: (1) kills another human being; . . . while acting under sudden heat commits voluntary manslaughter, a Class B felony. However, the offense is a Class A felony if it is committed by means of a deadly weapon." Ind. Code § 35-42-1-3(a).

The State charged Brown with Class A felony voluntary manslaughter and a jury found him guilty.

DISCUSSION AND DECISION

The manner of instructing a jury lies largely within the sound discretion of the trial court, and we review its decision only for an abuse of that discretion. *Simpson v. State*, 915 N.E.2d 511, 519 (Ind. Ct. App. 2009), *trans. denied*. "An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court." *Stringer v. State*, 853 N.E.2d 543, 546 (Ind. Ct. App. 2006).

Brown claims the trial court abused its discretion by declining to instruct the jury on self-defense and on involuntary manslaughter as a lesser-included offense of voluntary manslaughter. He acknowledges the trial court instructed the jury on reckless homicide, but argues instructions on self-defense and involuntary manslaughter were also warranted. We hold the trial court did not abuse its discretion.

When a trial court declines a tendered instruction, we consider: "(1) whether the instruction is a correct statement of the law; (2) whether there was evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court." *Simpson*, 915 N.E.2d at 519. Brown and the State do not dispute whether the tendered instructions correctly state the law or whether they are covered by the other instructions given by the court; thus we address only whether the evidence supported the instruction. "A criminal defendant is entitled to have the jury

instructed on any theory of defense which has some foundation in the evidence." *Creager v. State*, 737 N.E.2d 771, 777 (Ind. Ct. App. 2000), *trans. denied*.

1. Self Defense

Brown proposed the following instruction, which quotes a portion of Ind. Code § 35-41-3-2:

> (a) A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:
> (1) is justified in using deadly force; and
> (2) does not have a duty to retreat;
> if the person reasonably believes that the force [is] necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

(App. at 51-52.)

To prevail on a claim of self-defense, "the defendant must show that he: (1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm." *Simpson*, 915 N.E.2d at 514.

Brown contends he "was entitled to have the jury instructed on self defense even if the evidence is weak and inconsistent." (Appellant's Br. at 9.) Moreover, he asserts, "The weaknesses in his claim should not have led the court to refuse to instruct the jury on it. . . . The resolution of the reasonableness of Brown's actions should properly have been left to the jury." (*Id*. at 12.)

The trial court declined to give Brown's self-defense instruction because it found no evidence Brown was in fear of serious bodily injury when he stabbed Clark: "I know he was in a lawful place that he had a right to be. Did he act without fault[?] [Y]ou start . . . to get on weak ground and then the third being was it in defense of himself[? In defense of] serious bodily injury or death[?] . . . I don't see that." (Tr. at 245.) During his examination about the fight, Brown testified, "Well, I mean, I thought he was going to hit me some more or something -- I didn't know." (*Id*. at 189.)

In *Howard v. State*, 755 N.E.2d 242 (Ind. Ct. App. 2001), we held Howard was not entitled to a self-defense instruction because he offered no testimony that he was in fear of bodily harm when he struck the victim. Moreover, Howard grabbed the victim as she started to walk away. "Even though only a scintilla of evidence is necessary to support the giving of a self-defense instruction, our review of Howard's testimony reveals that Howard failed to establish a sufficient basis for a self-defense instruction." *Id*. at 248. *See also Henson v. State*, 786 N.E.2d 274 (Ind. 2003) (self-defense instruction declined because "there is nothing in the record to sustain Defendant's contention that he was reasonable in his belief of imminent bodily harm").

The facts in *Howard* are similar to the facts in this case. Clark was the initial aggressor and hit Brown in the jaw, but there was no evidence Brown had a reasonable fear of death or great bodily harm. Rather, the evidence indicates Brown thought Clark "was

going to hit me some more or something -- I didn't know." (*Id*. at 189.) Brown twice stabbed Clark with a knife, once in the chest. Clark's blow to Brown's jaw was not life threatening and, even if Clark was about to punch Brown in the face again, those facts could not give rise to a reasonable belief "that [deadly] force [was] necessary to prevent serious bodily injury." Ind. Code § 35-41-3-2(a). Thus the facts do not justify Brown's use of a deadly weapon, and the trial court did not abuse its discretion in refusing Brown's self-defense instruction.

2. Involuntary Manslaughter

At the close of trial, Brown proposed the jury be instructed on involuntary manslaughter as a lesser-included offense of voluntary manslaughter.[2] When a defendant requests a lesser-included-offense instruction, the trial court should perform the three-part

[2] The proposed instruction was:

> The crime of Involuntary Manslaughter is defined by statute as follows:
>
> > A person who kills another human being while committing or attempting to commit Battery commits Involuntary Manslaughter, a Class C felony.
>
> The crime of Battery is defined by statute as follows:
>
> > A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits Battery, a Class B Misdemeanor. However, the offense is a Class C Felony is [sic] it is committed by means of a deadly weapon.
>
> To convict the Defendant, the State must have proved each of the following elements:
>
> > The Defendant Lawrence Brown
> > 1. killed
> > 2. Bobby Clark
> > 3. while committing or attempting to commit Battery.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of Involuntary Manslaughter, a Class C Felony.
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Involuntary Manslaughter, a Class C Felony.

(Appellant's App. at 59.)

analysis from *Wright v. State*, 658 N.E.2d 563 (Ind. 1995). The first two parts require the court to determine whether the lesser offense is either inherently or factually included in the charged offense. *Id.* at 566. If it is, then the court determines whether a serious evidentiary dispute exists whereby the jury could conclude the lesser offense was committed but not the greater offense. *Id*. at 566-67.

When charging voluntary manslaughter, the State alleged: "Lawrence E. Brown . . . did knowingly kill . . . Bobby Clark, by stabbing with a deadly weapon, that is: a knife, at and against the person of Bobby Clark." (Appellant's App. at 22.) Involuntary manslaughter occurs when a person "kills another human being while committing or attempting to commit . . . (3) battery . . . ." Ind. Code § 35-42-1-4(c). Involuntary manslaughter may be a factually-included lesser offense of voluntary manslaughter if the charging instrument alleges that a battery accomplished the killing. *Ketcham v. State*, 780 N.E.2d 1171, 1177 (Ind. Ct. App. 2003), *trans. denied.* Thus, in this case, where the State alleged a battery (stabbing with a knife) as the means by which Brown committed voluntary manslaughter, involuntary manslaughter is a factually-included lesser offense. *See Brown v. State*, 659 N.E.2d 652, 656 (Ind. Ct. App. 1995) (finding involuntary a lesser included of voluntary because the State charged a touching), *trans. denied*.

Thus, we must determine whether there was a serious evidentiary dispute about the element distinguishing those crimes. *See Wright*, 658 N.E.2d at 567. The element distinguishing involuntary manslaughter from voluntary manslaughter is intent. *Brown*, 659

N.E.2d at 657. For voluntary manslaughter, the State charged Brown with killing Clark "knowingly." (Appellant's App. at 22.) Involuntary manslaughter, on the other hand, requires no specific *mens rea* regarding the killing, only intent to commit battery. *Brown*, 659 N.E.2d at 657.

The policy behind the three-part analysis from *Wright* "is to allow the jury to make a determination on the distinguishing element by finding the defendant guilty of the lesser-included offense." *Hamilton v. State*, 783 N.E.2d 1266, 1269 (Ind. Ct. App. 2003), *trans. denied*. The trial court instructed Brown's jury on reckless homicide, which requires a killing be only reckless, not knowing or intentional. Ind. Code § 35-42-1-5 ("A person who recklessly kills another human being commits reckless homicide."). The trial court's decision to give both the voluntary manslaughter and reckless homicide instructions indicates it found Brown's level of culpability to be in question.

Nevertheless, we need not reverse for a new trial unless Brown was prejudiced by the trial court's decision not to give the involuntary manslaughter instruction. *See Massey v. State*, 803 N.E.2d 1133, 1137 (Ind. Ct. App. 2004) (An error in a particular instruction will not result in reversal unless the defendant can affirmatively show the erroneous instruction prejudiced his substantial rights). The trial court gave Brown's jury the opportunity to determine that Brown did not knowingly kill Clark when it instructed the jury on reckless homicide. But Brown's jury declined to so find. Thus, any error in failing to instruct the jury on involuntary manslaughter was harmless. *See Hamilton*, 783 N.E.2d at 1269 (finding no

prejudice in trial court's refusal to instruct on criminal recklessness when jury was instructed on reckless homicide, but instead found defendant guilty of voluntary manslaughter).

CONCLUSION

The trial court did not abuse its discretion in its instructions to the jury. Accordingly, we affirm.

Affirmed.

BAILEY, J., and BARNES, J., concur.