IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CR-427

John B. Larkin,
Appellant (Defendant below),

–v–

State of Indiana,
Appellee (Plaintiff below).

Decided: September 14, 2021

Appeal from the LaPorte Superior Court
No. 46D01-1212-FA-610
The Honorable Roger Bradford, Special Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 19A-CR-2705

Opinion by Justice Massa

Chief Justice Rush and Justices Slaughter and Goff concur.
Justice David dissents with separate opinion.

Massa, Justice.

This is the latest appeal from the prosecution of John Larkin for the 2012 death of his wife, Stacey. Charged with voluntary manslaughter, Larkin was convicted of involuntary manslaughter as a lesser included offense. He raised four issues on appeal. The Court of Appeals reversed his conviction after finding the jury should not have been instructed on involuntary manslaughter. Because we conclude this instruction was proper under the circumstances and reject Larkin's remaining arguments, we affirm.

Facts and Procedural History

On the evening of December 11, 2012, Larkin and Stacey engaged in a domestic altercation. Stacey was shot twice and died; either shot could have been fatal. Two days later, Larkin voluntarily spoke with the police in a lengthy, videotaped interview, providing the only complete first-person account of the incident. He stated that after the confrontation began, he saw Stacey reach for a handgun stored in their bedroom safe. He grabbed the handgun just as she put her hand on it and told her, among other things, that he was calling the police. Stacey ran at Larkin and knocked them both to the ground. The handgun discharged and shot Stacey, who began scratching Larkin's face. He pushed her into a corner with the handgun, which again discharged and shot Stacey. After the second shot, Stacey did not move.

Shortly after Larkin's interview, the State charged him with voluntary manslaughter as a Class A felony in violation of Indiana Code section 35-42-1-3(a)(1). Specifically, the information alleged Larkin "did knowingly or intentionally kill another human being, to-wit: Stacy [sic] Simon Larkin; while acting under sudden heat, such killing being committed by means of a deadly weapon, to-wit: a handgun." Appellant's App. Vol. IV, p.71.

As the case progressed, it developed a lengthy procedural history, primarily due to law enforcement and prosecutorial misconduct and Larkin's resulting motions. *State v. Larkin*, 100 N.E.3d 700 (Ind. 2018); *State v. Larkin*, 77 N.E.3d 237 (Ind. Ct. App. 2017), *vacated*; *Larkin v. State*, 43

N.E.3d 1281 (Ind. Ct. App. 2015); *see also In re Neary*, 84 N.E.3d 1194 (Ind. 2017) (suspending the former lead prosecutor from the practice of law for at least four years due, in part, to his misconduct while prosecuting Larkin). In May 2019, Larkin filed his final motion to dismiss premised, in part, on the State's failure to disclose that the handgun was defective. After the court denied this motion, the case would proceed to trial in September. The week before trial, the State tendered a jury instruction on reckless homicide as a lesser included offense. The parties and court briefly discussed it at a pretrial hearing and acknowledged it would depend on the evidence presented at trial.

During the five-day trial, the jury heard evidence that included Larkin's videotaped interview. On the morning of the fourth day, the court rejected the tendered reckless homicide instruction. At the end of the day, the State asked whether it would "be permitted to ask about involuntary manslaughter." Tr. Vol. V, p.229. The trial court indicated this could occur the next morning. At the beginning of the fifth day, the State formally tendered an instruction on the lesser included offense of involuntary manslaughter based on a battery.[1] Over Larkin's objection that he lacked fair notice of that lesser included offense, the court gave the instruction.

At closing, the parties focused more on voluntary than involuntary manslaughter. On involuntary manslaughter, the State argued that Larkin committed the predicate battery by pushing Stacey, while Larkin argued self-defense.

The jury found Larkin guilty of involuntary manslaughter, a Class C felony, for killing his wife while committing a battery in violation of Indiana Code section 35-42-1-4(c)(3). During sentencing, the trial court found the handgun to be an aggravator before sentencing Larkin to two years of incarceration. Larkin appealed, challenging: (1) the involuntary

[1] "A person who kills another human being while committing or attempting to commit: battery; commits involuntary manslaughter, a Class C felony." Ind. Code § 35-42-1-4(c)(3) (2012) (recodified as I.C. § 35-42-1-4(b)(3)). "A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery." I.C. § 35-42-2-1(a).

manslaughter instruction; (2) the sufficiency of the State's evidence to negate his self-defense claim; (3) the denial of his most recent motion to dismiss; and (4) the handgun's status as an aggravator.

The Court of Appeals reversed Larkin's conviction after addressing only two of his arguments. It found the information did not allege Larkin shot Stacey "with an intent to batter rather than with an intent to kill" or that he "committed [a] battery by pushing Stacey." *Larkin v. State*, 159 N.E.3d 976, 986–87 (Ind. Ct. App. 2020), *vacated*. And there was, "at a minimum, reasonable doubt as to whether the State's charging instrument provided Larkin with fair notice of the charge of which he was eventually convicted." *Id.* at 987. The panel also briefly concluded there was insufficient evidence to contradict Larkin's self-defense claim. *Id.* at 988 n.9.

The State sought transfer, which we now grant. *See* Ind. Appellate Rule 58(A).

Standards of Review

The existence of a lesser included offense is a question of law, which we review de novo. *Young v. State*, 699 N.E.2d 252, 255 (Ind. 1998). When the trial court makes an express finding on the existence of an evidentiary dispute between the charged and lesser included offenses or does not make such a finding when the specific issue was not raised, we review for an abuse of discretion. *Brown v. State*, 703 N.E.2d 1010, 1020 (Ind. 1998). Such abuse occurs when the trial court "misinterprets the law," *Yao v. State*, 975 N.E.2d 1273, 1276 (Ind. 2012), or its "decision is clearly against the logic and effect of the facts and circumstances before it," *Hoglund v. State*, 962 N.E.2d 1230, 1237 (Ind. 2012). If a defendant objects to an instruction on the lesser included offense based on his lack of fair notice, he raises a constitutional claim, which we review de novo. *Young v. State*, 30 N.E.3d 719, 728 (Ind. 2015); *Hendricks v. State*, 162 N.E.3d 1123, 1135 (Ind. Ct. App. 2021), *trans. denied*.

When a defendant alleges the State did not sufficiently rebut his self-defense claim, we do not reweigh evidence or assess witness credibility,

and only look "to the evidence most favorable to the judgment." *Miller v. State*, 720 N.E.2d 696, 699 (Ind. 1999). "[W]here such evidence and reasonable inferences constitute substantial evidence of probative value sufficient to support the judgment," we affirm. *Id.* We review the denial of a motion to dismiss a charging instrument for an abuse of discretion. *Yao*, 975 N.E.2d at 1276. Likewise, we review sentencing decisions for an abuse of discretion. *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002).

Discussion and Decision

Larkin raises four issues: (1) whether the trial court appropriately instructed the jury on involuntary manslaughter; (2) whether the State presented sufficient evidence to overcome his self-defense claim; (3) whether the trial court erred by denying his most recent motion to dismiss; and (4) whether the trial court improperly considered the handgun as an aggravator. We discuss each issue and, in doing so, reject Larkin's arguments.

I. The trial court appropriately instructed the jury on involuntary manslaughter.

During a criminal trial, either party can request a jury instruction on a lesser included offense.[2] *Webb v. State*, 963 N.E.2d 1103, 1108 (Ind. 2012). When this occurs, the court must engage in the analysis we set forth in *Wright v. State*, 658 N.E.2d 563, 566–67 (Ind. 1995). First, the court must determine whether the lesser offense is inherently or factually included in the charged offense. *Id*. If it is either, the court must then determine whether "a serious evidentiary dispute" exists between the elements that distinguish the offenses. *Id.* at 567. In other words, there must be sufficient

[2] Our precedent that the door swings both ways volleys the dissent's assertion that "the State should [not] be able to seek a lesser included instruction mid trial once it realizes things aren't going well." *Post*, at 2. It can, so long as the charging documents provide adequate notice and the record at trial reveals a serious evidentiary dispute.

evidence for the jury to find the defendant committed the lesser offense but not the charged offense. *Id.* If a dispute exists, the court must give the instruction. *Id.* When the State makes the request, however, the defendant must have been on fair notice that he could have been convicted of the offense. *Young*, 30 N.E.3d at 725. Here, we find that involuntary manslaughter was a factually included lesser offense, there was a serious evidentiary dispute, and Larkin had fair notice. We discuss each in turn.

A. Involuntary manslaughter was a factually included lesser offense.

A lesser offense can be either inherently or factually included in the charged offense. *Wright*, 658 N.E.2d at 566–67. Here, both parties correctly recognize that involuntary manslaughter is not an inherently included lesser offense of voluntary manslaughter (or murder, for that matter).[3] However, it may be a factually included lesser offense if the charging document alleged all of its elements. *Id.* at 567.

The information alleged that Larkin knowingly or intentionally killed Stacey with a handgun. The State sought the involuntary manslaughter instruction on the basis of a battery. A battery is a knowing or intentional touching "in a rude, insolent, or angry manner." Ind. Code § 35-42-2-1(a) (2012). A knowing or intentional killing with a handgun can be classified as a battery. *See Lynch v. State*, 571 N.E.2d 537, 538–39 (Ind. 1991). The necessary physical contact occurs when the defendant shoots the victim, *id.*, or otherwise uses the handgun to cause a rude, insolent, or angry touching, *see Fisher v. State*, 541 N.E.2d 520, 522 (Ind. 1989). Here, by alleging Larkin knowingly or intentionally killed Stacey with a handgun, the information alleged that he committed a battery against her. *Cf. Champlain v. State*, 681 N.E.2d 696, 702 (Ind. 1997) (concluding the information did not allege a battery when it merely stated the defendant

[3] An offense is inherently included when it can be proven by all, or less than all, material elements of the charged offense or by a lesser *mens rea*. *Wadle v. State*, 151 N.E.3d 227, 251 n.30 (Ind. 2020).

knowingly killed the victim). Thus, involuntary manslaughter based on a battery was a factually included lesser offense.

B. There was a serious evidentiary dispute about the elements that distinguish voluntary manslaughter from involuntary manslaughter.

The trial court must instruct the jury on the lesser included offense only if there is a serious evidentiary dispute on the elements that distinguish it from the charged offense. *Wright*, 658 N.E.2d at 567. Voluntary manslaughter requires an intentional or knowing killing in sudden heat, I.C. § 35-42-1-3(a)(1), while involuntary manslaughter only requires a battery that "incidental[ly]" kills the victim, *Ingram v. State*, 547 N.E.2d 823, 831 (Ind. 1989); I.C. § 35-42-1-4(c)(3).

Here, there was a serious evidentiary dispute. During his interview, Larkin stated that he only intended to push Stacey with the gun. If the jury believed him, then it could (as it did) convict him of involuntary manslaughter. *See Wright*, 658 N.E.2d at 567. But he also mentioned the heated verbal and physical confrontation between him and Stacey just before she was shot, his finger's placement on the trigger at one point, and the serious marital issues between them. Larkin's witnesses also testified about those issues. From this evidence, the jury could reasonably infer Larkin intentionally or knowingly killed Stacey while under sudden heat. Because there was sufficient evidence to support a conviction of either offense, there was no abuse of discretion.[4]

[4] We also note that the jury could have found Larkin knowingly or intentionally shot Stacey to batter her, not kill her, *see Lynch v. State*, 571 N.E.2d 537, 539 (Ind. 1991), and thus found him guilty of involuntary manslaughter for the unintended death.

C. With the *Wright* analysis satisfied, we turn to the constitutional analysis of fair notice and conclude that Larkin was not deprived of it.

Due process entitles a defendant to limit his defense to the charging instrument's allegations. *Young*, 30 N.E.3d at 723, 725. This means he must have fair notice of the offenses of which he may be convicted. *Id*. at 725. Without fair notice, the trial court cannot instruct the jury on a lesser included offense, regardless of the *Wright* analysis. *Id.*

By alleging Larkin killed Stacey with a handgun, the information referenced—and provided notice of—"a battery that could have been a basis for an involuntary manslaughter conviction." *Norris v. State*, 943 N.E.2d 362, 369 (Ind. Ct. App. 2011), *trans. denied*; *cf. Champlain*, 681 N.E.2d at 702. The wrinkle here arises from the State's argument at closing that Larkin committed the necessary battery by **pushing** Stacey. Understandably, the allegation in the information—killing with a handgun—invokes a shooting, not a pushing. But here, Larkin stated during his pre-charge interview that he intentionally pushed Stacey with the handgun, which resulted in its second discharge. Because pushing someone with a loaded handgun is, at a minimum, a rude touching, Larkin admitted to committing a battery against Stacey. And that battery resulted in her death. At trial, the State simply used Larkin's admission against him.

Larkin's reliance on *Young* to allege a lack of fair notice is ultimately unavailing. There, the defendants were charged with murder for a **shooting** but convicted of attempted aggravated battery for a **beating**. *Young*, 30 N.E.3d at 721–22. While both the shooting and beating involved a battery, they were accomplished by completely different means. *Id.* at 725. Here, the voluntary manslaughter charge and involuntary manslaughter conviction were both based on the same means: the handgun.

The State charged Larkin following his interview and could have foreclosed its pushing argument. *See id.* But it did not. We cannot say Larkin was deprived of fair notice when the information alleged a battery

and Larkin himself alerted the State to a possible theory of the case that it ultimately argued at trial.

II. The State presented sufficient evidence to overcome Larkin's self-defense claim.

A defendant can raise self-defense as a justification for an otherwise criminal act. I.C. § 35-41-3-2; *Miller*, 720 N.E.2d at 699. When self-defense is asserted, the defendant must prove he was in a place where he had a right to be, "acted without fault," and reasonably feared or apprehended death or great bodily harm. *Miller*, 720 N.E.2d at 699–700. The State must then negate at least one element beyond a reasonable doubt "by rebutting the defense directly, by affirmatively showing the defendant did not act in self-defense, or by simply relying upon the sufficiency of its evidence in chief." *Lilly v. State*, 506 N.E.2d 23, 24 (Ind. 1987). We will reverse a conviction only if no reasonable person could say the State overcame the self-defense claim beyond a reasonable doubt. *Id.*

Here, the State met its burden by presenting evidence that allowed the jury to reject Larkin's self-defense claim. Larkin's interview alone was more than enough. For example, the jury could have found that he was the initial aggressor after he stated that he grabbed the handgun from the safe or that he escalated the situation with inflammatory remarks. *See Miller*, 720 N.E.2d at 700 (noting self-defense is generally not available to the initial aggressor). The jury also could have found that Larkin's response—pushing Stacey with a loaded handgun—was not "proportionate to the urgency of the situation." *Hollowell v. State*, 707 N.E.2d 1014, 1021 (Ind. Ct. App. 1999). As the trier of fact, the jury was empowered to assess Larkin's credibility and weigh the evidence. We have no such power. In short, the record did not contain "no evidence whatsoever," *Cobbs v. State*, 528 N.E.2d 62, 64 (Ind. 1988), to contradict Larkin's self-defense claim.

III. The trial court did not abuse its discretion by denying Larkin's motion to dismiss for prosecutorial misconduct.

Dismissal of a charging instrument "is an extreme remedy." *Larkin*, 100 N.E.3d at 707. A defendant can only succeed on a claim of prosecutorial misconduct if the misconduct placed him "in a position of grave peril." *State v. Taylor*, 49 N.E.3d 1019, 1029 (Ind. 2016). At issue here is Larkin's most recent motion to dismiss, which partially rested on the misconduct this Court considered in *Larkin*, 100 N.E.3d at 706–07. There, we recognized the appropriate remedy was, if necessary, suppression of the tainted evidence. *Id.* The trial court acted accordingly by holding a taint hearing. We will not revisit that misconduct. *See State v. Timbs*, 169 N.E.3d 361, 369–70 (Ind. 2021).

Larkin added another allegation of misconduct: the State's failure to disclose that his handgun was defective. In May 2016, approximately three weeks before a trial date, the State's firearms expert discovered that Larkin's handgun had been recalled because of defects that caused it to unintentionally fire. She informed the prosecutor, who never informed Larkin. Trial did not proceed on the set date, because the trial court dismissed the case, which we reversed. *Larkin*, 100 N.E.3d at 708. Larkin then found a new firearms expert who knew about the defect.

In denying Larkin's pretrial motion, the trial court (appropriately) focused on the nondisclosure. Although it found the State committed misconduct, it concluded that Larkin was not prejudiced because he had sufficient time to incorporate the defects into his defense. The trial court's decision was far from an abuse of discretion. By then, Larkin had an expert who was knowledgeable about the defective handgun and performed tests on it. We do not condone the State's lack of disclosure, particularly in a case already rife with misconduct. *Id.* at 706. But because

Larkin had adequate time to, and did, incorporate the defects into his defense, we cannot say the misconduct placed him in grave peril.[5]

IV. The trial court did not abuse its discretion by treating the handgun as an aggravator, but even if it did, Larkin was not prejudiced.

During sentencing, a trial court abuses its discretion by considering aggravators that "are improper as a matter of law." *Anglemyer v. State*, 868 N.E.2d 482, 490–91 (Ind. 2007), *clarified on reh'g*. But when it does, a defendant is not entitled to resentencing if "the record is clear that the trial court would have imposed the same sentence without regard to the challenged aggravators." *McDonald v. State*, 868 N.E.2d 1111, 1114 (Ind. 2007). In other words, the defendant must have been prejudiced by the improper aggravators. *Id.*

At sentencing, the trial judge found one aggravator—the use of a handgun. He noted that this aggravator had (apparently) been previously upheld as part of his "one-man crusade against handguns." Tr. Vol. VI, p.110. He also found the numerous mitigators "far outweigh[ed]" the aggravator, which caused him to subtract two years from the four-year advisory sentence. *Id.* But once there, the aggravator and mitigators did not affect his decision to sentence Larkin to the two-year statutory minimum, I.C. § 35-50-2-1(c)(4), with none suspended. Larkin alleges that without the improper aggravator, his minimum sentence likely would have been suspended.

It is well established that the trial court may consider the nature and circumstances of the crime as an aggravator. *McCann v. State*, 749 N.E.2d 1116, 1120 (Ind. 2001). Here, the handgun was part of the nature and

[5] During trial, Larkin renewed his motion after the State sought to introduce a recording of an interview between his children and the investigating officer that was recovered at the last minute. Because the trial court appropriately denied the State's request, its denial of Larkin's renewed motion was not an abuse of discretion.

circumstances of the crime: Larkin used it to commit a battery against Stacey, which resulted in her death and his involuntary manslaughter conviction. But even if the trial court used the aggravator to inappropriately send "a personal philosophical or political message," *Beno v. State*, 581 N.E.2d 922, 924 (Ind. 1991), Larkin was not prejudiced. Despite the aggravator, he received the minimum sentence. And nothing indicates the trial court would have otherwise suspended it. A contrary conclusion requires speculation that is unsupported by the record, which establishes the aggravator played no role in the court's decision not to suspend his sentence.

Conclusion

Because we reject all of Larkin's arguments, we affirm the judgment of the trial court.

Rush, C.J., and Slaughter and Goff, JJ., concur.
David, J., dissents with separate opinion.

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David, J., dissenting.

I respectfully dissent to the majority opinion. I do not believe that the trial court appropriately instructed the jury on involuntary manslaughter given the facts and circumstances here. I would deny transfer and let the Court of Appeals opinion stand.

I do not agree with the majority's analysis about battery being factually included in the offense here, given the charging information and the facts and circumstances here. While battery may be included where there is a murder by handgun, I'm not sure that's always the case.

I note a few things about the case relied upon by the State and the majority, *Lynch v. State*, 571 N.E.2d 537, 538–39 (Ind. 1991), for the proposition that killing by handgun necessarily involves a battery. The decision in *Lynch* was very fact specific as evidenced by the Court including limiting language such as "here" and "this is not such a case." *Id*. at 539. The Court did not craft a broad rule providing that any and all killing by handguns is necessarily battery in every case and acknowledged that the language of the charging information could limit lesser included instructions. Here, the charging information is terse and only alleged that a handgun was used without more. That it is, it provides the "killing" was accomplished by the handgun with zero mention of a battery or facts that would even indicate one. We don't read words into statutes when interpreting them and I do not believe we should read them into charging information either.

Further, it was defendant that sought the lesser included instruction in *Lynch* and not the State. This distinction is important. As this Court recently noted, "a lesser-included offense implicates a defendant's due process right to fair notice: unless the defendant himself requests an instruction on the offense (thereby waiving the notice requirement)[.]" *Wadle v. State*, 151 N.E.3d 227, 251 (Ind. 2020). The State had over six years within which it could have amended the charging information to include an involuntary manslaughter charge against Larkin or mention some form of battery, but it did not do so. Then during trial and just minutes before

final instructions and closing arguments, the State proffered its jury instruction on involuntary manslaughter based on a battery, to which Larkin objected. I agree with Larkin that this does not give his counsel adequate time to prepare a defense. The act of pushing his wife with a handgun and pulling a trigger are separate and distinct and occurred at different times during Larkin's confrontation with his wife. These acts have distinct legal consequences and defenses.

I do not believe that the State should be able to seek a lesser included instruction mid trial once it realizes things aren't going well or use a vague charging information to ambush a defendant. I fear the precedent the majority opinion sets will open the door to prosecutors trying to slip in other "lesser included" charges at the last minute. If the State wants to be able to seek a lesser included conviction based on involuntary manslaughter, it should clearly and plainly allege a battery in the charging information.

Accordingly, I respectfully dissent.