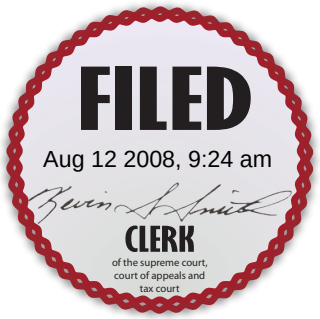

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IN THE
COURT OF APPEALS OF INDIANA

ANTREAUN RICE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0801-CR-10
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Paula Lopossa, Judge Pro Tempore
Cause No. 49G01-0604-MR-72259

August 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Antreaun Rice appeals his conviction and sentence for Murder, a felony, following a jury trial.[1] Rice raises two issues for review, namely:

1. Whether the trial court abused its discretion when it refused to instruct the jury on criminal recklessness.

2. Whether Rice's sentence is inappropriate in light of the nature of the offenses and his character.

We affirm and remand.

FACTS AND PROCEDURAL HISTORY

On April 17, 2006, in Indianapolis, Rice's girlfriend drove Rice and his cousin in her minivan to a gas station and a liquor store, where Rice bought a bottle of gin. Rice asked a child where his mother, Beverly Longstreet, lived, and the child pointed to a house across the street. Rice, his girlfriend, and his cousin then returned to his cousin's house, and Rice's girlfriend left.

Shortly after, Rice and his cousin walked to Longstreet's home. There, Rice and his friend visited with Longstreet and three other women, and Rice drank the bottle of gin he had brought with him. After thirty to forty-five minutes, Rice's cousin left, and Rice asked if any of the women wanted a date. When the women refused Rice's advances, Rice became angry and called them "broke bitches" and other profane names. Transcript at 217. As he was leaving, he threw and broke a bottle near one of Longstreet's children on the home's front porch. Longstreet retrieved a baseball bat from the house and returned to the alley where Rice stood, continuing to argue with him. One of the other

[1] Rice was also convicted of Attempted Murder, a Class A felony, and Carrying a Handgun Without a License, as a Class A misdemeanor, but the issues raised on appeal address only the murder conviction and his sentence.

women retrieved a handgun from the house and stepped out onto the porch. Before leaving, Rice shouted, "I swear to God on my kids that every one of ya'll is going to die." Transcript at 118.

Later that night, Longstreet was sitting in the living room with DeAndre Gaines, a fourteen-year-old child who had come to visit. The other children in the household were in bed, and Gaines was awaiting a ride home. Around midnight, a minivan pulled up in front of the home. Shortly after, Longstreet heard three gunshots. Gaines said he was shot and started up the stairs. Longstreet then realized that she had also been shot. She looked out the window toward the front porch and saw Rice standing on the porch. Rice then fled.

Longstreet's daughter dialed 911. When Officer Ronald Clayton arrived at the scene, he entered the front porch and observed that the front room was lighted by a floor lamp. Through a window, he saw Longstreet sitting on the couch, and he observed a large bullet hole in the window. On the porch near the window, Officer Clayton found a shell casing.

When Officer Clayton entered the front room, he found Longstreet on the couch, leaning toward the window and holding a pillow over her stomach. He assessed her medical condition and then followed a trail of blood up some stairs. Officer Clayton found Gaines collapsed at the top of the stairs. Gaines had sustained a gunshot through his left hand and in his side, and his breathing was erratic. A short while later, Gaines lost consciousness. Longstreet and Gaines were transported to the hospital, where Gaines died from his wounds and Longstreet spent a week recovering.

The State charged Rice with murder, a felony; attempted murder, a Class A felony; aggravated battery, as a Class B felony; and carrying a handgun without a license, as a Class A misdemeanor. A jury returned guilty verdicts on all charges, and the trial court entered judgment of conviction on the murder, attempted murder, and handgun charges. After a hearing, the court found no mitigators and two aggravators, namely, Rice's criminal history and the nature of the offenses, including the fact that the murder victim was his mother's only son. The court sentenced Rice to sixty-five years for murder, fifty years for attempted murder, and one year for carrying a handgun without a license. The court ordered the sentences to be served consecutively, for an aggregate sentence of 116 years. Rice now appeals.

DISCUSSION AND DECISION

Issue One: Jury Instructions

The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. Ct. App. 2003), cert. denied, 540 U.S. 1150 (2004). Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. Id. at 1163-64. Rice contends that the trial court abused its discretion by refusing to instruct the jury on criminal recklessness as a lesser included offense of murder and by instructing the jury on transferred intent. We address each contention in turn.

Criminal Recklessness Instruction

Rice first contends that the trial court abused its discretion by refusing Rice's request for a criminal recklessness instruction[2] on the murder charge. Thus, we review Rice's contention as an appeal from the trial court's refusal to instruct on a lesser included offense. We perform a three-part test to determine whether a trial court should have instructed a jury on a lesser included offense:

> First, the trial court should determine whether the lesser offense is inherently included in the charged offense. If the offense is not inherently included, then the trial court should determine if it is factually included in the charged offense. Finally, if the offense is either inherently or factually included in the charged offense, the court should examine the evidence and determine whether there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense.

Gale v. State, 882 N.E.2d 808, 814 (Ind. Ct. App. 2008) (citing Wright v. State, 658 N.E.2d 563 (Ind. 1995)). Where a trial court makes a finding as to the existence or absence of a substantial evidentiary dispute, we review the trial court's rejection of a tendered instruction for an abuse of discretion. Id.

Addressing the first step of the test, we observe that "[c]riminal recklessness is an inherently lesser included offense for [m]urder." Miller v. State, 720 N.E.2d 696, 703 (Ind. 1999). Thus, we need not determine whether the offense is factually included in

[2] Rice has not set out verbatim in the argument section of his brief the jury instructions at issue, nor has he cited to where we might find those instructions in the appendix. "When error is predicated on the giving or refusing of any instruction, the instruction shall be set out verbatim in the argument section of the brief with the verbatim objections, if any, made thereto." Ind. Appellate Rule 46(A)(8)(e). Ordinarily, an appellant waives the issue by failing to comply with this appellate rule. Dyer v. Doyle (In re Estate of Dyer), 870 N.E.2d 573, 581 (Ind. Ct. App. 2007), trans. denied. However, Rice provided a copy of the jury instructions appealed from at the back of his brief. Thus, we address the merits of Rice's argument. However, we remind counsel to comply with Appellate Rule 46(A)(8)(e) in the future.

murder as charged, and we proceed to the next step in the test, determining whether there is a serious evidentiary dispute.

In his brief, Rice argues that a serious evidentiary dispute exists concerning his mens rea. In support, Rice quotes the following colloquy between defense counsel and the court:

> Mr. M. Inman [defense]: Where you could see people is where–there is not evidence that the shooter could see anybody. There's no evidence the shooter could see anybody. There is not evidence of that at all.
>
> Court: But an inference certainly can be made.
>
> Mr. M. Inman: And an inference can certainly be made that it was midnight, and didn't think anybody was up, and it was dark in there. The evidence on lighting is all about the back. There's none about the front. None about that. That somebody could have come up and shot into a dark–at midnight, shot into a dark house that was quiet. That's equally as able [sic]. I'm equally as able to make that argument.
>
> Court: Well, I don't think the evidence was that the house was dark. There was a light on. Isn't that the evidence?
>
> Mr. M. Inman: There is no evidence that anyone can see into that or that the person that shot said or did anything – said or did anything at that point in time.
>
> Ms. B. Trathen [State]: Officer Clayton specifically testified as he came up on the front porch, he looked through the window and saw the woman in pain, was very descriptive about what he saw of that woman as he looked through the window with the bullet hole.
>
> Court: Well, I'm convinced that it's not an appropriate lesser included of count one [murder] based upon the evidence as it's presented. So I am not going to give it, maybe we'll be trying this case again a third time.
>
> Transcript at 449-51 (emphases added).
>
> He also argues:

> The trial court failed to remember and acknowledge that Officer Clayton also testified[,] "No. That was–that was the only light that was on in the front room. It was a very low lighting [sic] in the front room." [Tr. at 44.] "I use [sic] my light–my flashlight, my handheld flashlight. I looked at it, and I observed a bullet hole into her clothing." [Tr. at 48.] The trial court's conclusion that "there was a light on" as her [sic] reasoning for refusing to give the criminal recklessness jury instruction invaded the purview of the jury. The State's own witness' testimony establishes the possibility that the shooter may not have seen anyone sitting in the living room and may have assumed that the room was empty at that late hour. It was for the jury to decide based upon all available law and testimony whether the shooter knew potential victims where [sic] in the room.

Appellant's Brief at 6.

On appeal, Rice contends that a serious evidentiary dispute exists concerning whether there was sufficient light in the front room of the house to allow the shooter to see that there were actually people in the room. That is, Rice argues that he could not see anyone when he looked into the house because there was no lighting and, accordingly, he could not have intended to kill anyone when he shot the gun into the house. But that argument is not consistent with the argument his counsel made to the trial court. At trial, Rice's counsel argued that there was no evidence of light in the front of the house and that "[t]he evidence on lighting is all about the back." Id. at 450. Only when the trial court pointed out that there was indeed evidence of a light in the front room did Rice counter that "[t]here is no evidence that anyone can see into that." Id. But Officer Clayton testified that the front room had been lighted by a floor lamp; that he had looked through the front window, which contained a large bullet hole; and that through the window he had observed Longstreet sitting on the couch.

Rice does not direct us to any testimony showing that there is a serious evidentiary dispute as to whether a shooter could have seen people in the room. Rice relies only on

the argument of his attorney in support of his contention that he could not see anyone when looking into the house. But it is axiomatic that the argument of counsel is not evidence. Wilkerson v. State, 728 N.E.2d 239, 244 (Ind. Ct. App. 2000). Thus, the trial court did not abuse its discretion when it refused to instruct the jury on criminal recklessness as a lesser included offense to murder.

Transferred Intent[3]

Rice next contends that the trial court should not have instructed the jury on transferred intent. In reviewing a trial court's decision to give or refuse tendered jury instructions, this Court considers: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions which are given. Guyton v. State, 771 N.E.2d 1141, 1144 (Ind. 2002).

Rice argues that

> It is well established a charging information that states "knowingly" and not "knowingly and intentionally" is consider [sic] a greater standard of proof. Case v. State, 458 N.E.2d 223, 225 (Ind. 1984)[.] This is not the situation here. Here Mr. Rice was charged with the "knowing" killing of DeAndre Gaines. Then the jury is told it goes beyond knowingly killing DeAndre to knowingly and intentionally killing him. Then the jury is asked to take an additional leap to the concept of transferred intent. These lines of connection are too complicated and tenuous.
>
> The only witnesses to anything are a fourteen (14)[-]year[-]old boy who admits to changing his story to police[, Tr. at 137-46,] and the surviving victim who does not mention Mr. Rice to the first officer who encounters

[3] We observe that, again, Rice has neither set out the objectionable instruction verbatim nor has he cited to where we might find that instruction in the appendix. In such cases, an argument that the trial court abused its discretion by giving the instruction may be waived. See App. R. 46(A)(8)(e). But Rice has again appended copies of those instructions to the end of his appellate brief. Because Rice has identified the objectionable instructions, albeit not in compliance with the appellate rules, we will address the merits of Rice's claim.

> her, but identifies Mr. Rice as the assailant only after a police officer at the hospital ask [sic] her directly if it was the man from earlier in the day. [(Tr. at 251-52.)] We have faulty and tainted eyewitness identification, no forensic connection of Mr. Rice being there the night of the shooting, no other witnesses to the shooting, the State being permitted to have a tangential complicated intent jury instruction, the defense being denied a run of the mill criminal reckless [sic] jury instruction based upon the trial court's invading the purview of the jury.

Appellant's Brief at 6-7. Rice's specific argument regarding the transferred intent instruction is difficult to discern, though he appears to argue that the evidence does not support the giving of a transferred intent instruction. But Rice has not demonstrated that he preserved any issue regarding the transferred intent instruction by showing that he objected to the instruction at trial. See Luna v. State, 758 N.E.2d 515, 518 (Ind. 2001). Thus, he has waived the issue for review. See Ind. Trial R. 51(C) ("No party may claim as error the giving of an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection.").

Moreover, the only authority that Rice has cited regarding transferred intent instructions is Jones v. State, 868 N.E.2d 1205 (Ind. Ct. App. 2007), trans. denied. Jones addresses the necessity of correctly charging on the specific intent to kill element required to prove attempted murder. There, we found that the trial court abused its discretion by refusing to instruct the jury on criminal recklessness where intent had been the "crux of the case" at trial. Jones, 868 N.E.2d at 1213. But that case does not address any transferred intent instruction. Therefore, it is inapposite here. Moreover, we have already determined that Rice has not demonstrated that the trial court abused its discretion by refusing to give a criminal recklessness instruction as a lesser included

offense to murder. Thus, Rice has also waived his argument because he has not supported it with citations to relevant supporting authority. See App. R. 46(A)(8)(a).

Issue Two: Appellate Rule 7(B)

Rice also contends that his sentence is inappropriate in light of the nature of the offenses and his character. Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007) (quoting Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006)) (alteration original). This appellate authority is implemented through Indiana Appellate Rule 7(B). Id. Under Appellate Rule 7(B), we assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed was inappropriate. Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). However, "a defendant must persuade the appellate court that his or her sentence has met th[e] inappropriateness standard of review." Anglemyer, 868 N.E.2d at 494 (quoting Childress, 848 N.E.2d at 1080) (alteration in original).

Rice's aggregate 116-year sentence is not inappropriate in light of the nature of the offenses. Rice argued with and threatened Longstreet and her friends after the women had spurned his requests for a date. Before finally leaving, Rice said "I swear to God on my kids that every one of ya'll is going to die." Transcript at 118. Around midnight that night, Rice returned and fired three shots from the porch through the front room window of the house. Two shots hit Gaines in the hand and the chest, and one hit Longstreet in

her stomach. After being shot, Longstreet looked out the front window and saw Rice, who then fled. Gaines, a fourteen-year-old boy who had not been part of the earlier argument, died as a result of his wounds, and Longstreet was hospitalized for several days. We cannot say that Rice's sentence is inappropriate in light of the nature of the offenses.

Rice observes that the trial court described the offenses by stating that Rice "'sneaked up on the porch in the dark, shot through the window.'" Appellant's Brief at 9. Rice then argues that the trial court cannot "have it both ways" because "there cannot be enough light so somehow an injured woman was able to see and identify her assailant at night through a curtain sheer, but yet the accused Mr. Rice is receiving an aggravated sentence for his alleged actions 'in the dark.'" Id. (citing Transcript at 522). But Rice does not point to where in the transcript we might find any evidence that Longstreet identified Rice at the time of the shooting after seeing him through a curtain sheer. Nor is it inconceivable that it was dark outside but slightly illuminated on the porch and in the living room from the living room light.

Rice also argues that the trial court's statement at sentencing, that Rice "in the afternoon determined and said his intention was to come back with a gun and shoot the witnesses, Miss Longstreet," is unsupported by the record. Appellant's Brief at 9-10. But, again, Rice does not direct us to any evidence in the record to show how that statement is an incorrect summary of the evidence. Rice further contends that the trial court's reliance on Gaines' status as his mother's only son was not an appropriate aggravating circumstance. But Rice is appealing the appropriateness of his sentence, not

the identification of aggravators. The fact that Gaines, the murder victim, was an only son is a circumstance of the offense.

And Rice's reasoning that his offense was "by far not the worst of the worst" likewise fails. In support he cites to Brown v. State, 760 N.E.2d 243 (Ind. Ct. App. 2002), trans. denied. Although we acknowledged in Brown that the maximum sentence should be reserved for the very worst offenses and offenders, we went on to say:

> There is a danger in applying this principle . . . . If we were to take this language literally, we would reserve the maximum punishment for only the single most heinous offense. . . . This leads us to conclude the following with respect to deciding whether a case is among the very worst offenses and a defendant among the very worst offenders, thus justifying the maximum sentence: We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Id. at 247. In other words, we need not consider hypothetical situations necessary to evaluate the "worst of the offenders" argument. Rice has not met his burden of showing that his sentence is inappropriate in light of the nature of the offenses.

Rice also has not shown that his sentence is inappropriate in light of his character. Indeed Rice makes no argument regarding his character, claiming only that the trial court provided no detail specifying which part or parts of Rice's criminal history warrant the "quintuple use" of his criminal history to aggravate all three sentences and run them consecutive to each other. Appellant's Brief at 10. Rice's criminal history includes juvenile adjudications for disorderly conduct, as a Class B misdemeanor, in 1991 and conversion, as a class A misdemeanor, and burglary, as a Class B felony, in 1993. He has adult convictions dating back to 1995 for resisting law enforcement, as a Class A

misdemeanor; possession of marijuana, as a Class A misdemeanor; carrying a handgun without a license, as a Class A misdemeanor; two counts of carrying a handgun without a license, as Class C felonies; possession of cocaine, as a Class D felony; operating a vehicle never having received a license, as a Class C misdemeanor; and possession of marijuana, as a Class D felony. And despite the seriousness of the offenses here, when Rice refused to provide his own version of the instant offenses for the Pre-Sentence Investigation Report, he signed the form with "No Statement. Thank you" using two exclamation points made into a smiley face. Rice's sentence is not inappropriate in light of his character.

Conclusion

Rice has not shown that the trial court abused its discretion by refusing to instruct the jury on criminal recklessness as a lesser included offense to murder or by instructing the jury on transferred intent. Rice has also not met his burden of showing that his sentence is inappropriate in light of the nature of the offenses or his character. But our review of the record has disclosed an error that requires attention. The Chronological Case Summary ("CCS") and the abstract of judgment show that the trial court entered judgment of conviction for murder, aggravated battery, and the handgun charge. The parties in their respective briefs state that Rice was convicted of and sentenced for murder, attempted murder, and the handgun charge. Our review of the transcript confirms that the court sentenced Rice for attempted murder, not aggravated battery. Thus, we remand for the limited purpose of correcting the CCS and issuing a corrected abstract of judgment.

Affirmed and remanded.

DARDEN, J., and BROWN, J., concur.