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IN THE COURT OF APPEALS OF INDIANA

ERIC V. GRAVES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 43A03-0901-CR-24
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Duane G. Huffer, Special Judge
Cause No. 43C01-0805-FA-113

October 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Eric V. Graves appeals his conviction and sentence for attempted murder, a class A felony. We affirm.

Issues

Graves raises three issues for our review which we restate as:

I. Whether the trial court abused its discretion when it denied Graves's request to instruct the jury on the offense of criminal recklessness;

II. Whether the trial court committed reversible error when it instructed the jury on self-defense when neither party requested such instruction; and

III. Whether Graves's thirty-five year sentence is appropriate.

Facts and Procedural History

The relevant facts most favorable to the jury's verdict indicate that Graves was involved in a six-year adulterous affair with Carl Wireman's wife, Gina. On April 13, 2008, Gina informed Graves that Wireman, who was aware of the affair, had asked her to end the affair and work on their marriage. Gina also informed Graves that she was considering her husband's request and that she may in fact end the affair. At approximately 9:45 that night, Graves drove to Carl Wireman's home in Kosciusko County armed with three loaded handguns and 133 rounds of ammunition. Graves walked up to Wireman's front door and rang the doorbell. When Wireman opened the door, Graves pointed the laser sight of his handgun at Wireman's head and said "I'm here to kill you and your" and began to say the word "daughter." Tr. at 363. Wireman lunged out the front door and tackled Graves. The men crashed through the fence which lined the home's front porch and began wrestling on

the ground fighting for the gun. As the men fought, Graves continued to tell Wireman that he was going to kill him. At one point during the struggle, the gun discharged and Wireman felt the bullet graze the top of his hand.

Wireman, who was a member of the Kosciusko County SWAT team, managed to disarm Graves of the first gun and throw the gun into the yard. Graves then raised a second handgun toward Wireman and the men began to fight for control over the second gun. During the fight, Wireman yelled for his fourteen-year-old daughter, Mikayla, to call the police. When Mikayla came to the porch and saw the men struggling, she immediately ran and called 911. Wireman managed to disarm Graves of the second handgun and threw that gun into the street in front of the house. When Graves raised a third handgun, which was still in the holster, Wireman quickly grabbed that gun and threw it into the yard.

At that point, Wireman retreated inside his house. He ran to his garage and located a pistol. He then went back to his front door and sat inside the house waiting for police to arrive. Wireman looked out his window and saw that Graves was now sitting on the front porch holding one of the handguns. Once police arrived and had their guns drawn, Wireman opened his front door and walked outside. He immediately noticed that Graves was bleeding from the face and appeared to have shot himself under the chin. Wireman, who was a trained emergency medical technician, ran back inside to get his medical bag. Wireman worked on Graves, who was in critical condition, until an ambulance and emergency helicopter arrived.

The State charged Graves with two counts of class A felony attempted murder. Following a four-day trial, a jury found Graves guilty of the attempted murder of Carl

Wireman and not guilty of the attempted murder of Mikayla Wireman. The trial court entered a judgment of restitution and sentenced Graves to an executed sentence of thirty-five years. This appeal ensued.

Discussion and Decision

I. Criminal Recklessness Instruction

Graves contends that the trial court erred when it denied his oral request to instruct the jury on the offense of criminal recklessness. He asserts that criminal recklessness is a lesser-included offense of attempted murder and, therefore, the trial court's denial precluded the jury from convicting him of a lesser charge. Graves has waived this argument because he did not also tender a written jury instruction to the trial court. An oral request for a jury instruction is not enough and failure to tender the jury instruction in writing waives the claim on appeal. *Ketcham v. State*, 780 N.E.2d 1171, 1177 (Ind. Ct. App. 2003), *trans. denied*.[1]

Waiver notwithstanding, Graves's argument also fails on the merits. Instruction of the jury is left to the sound discretion of the trial court. *Ledesma v. State*, 761 N.E.2d 896, 898 (Ind. Ct. App. 2002). Our review of a trial court's decision is highly deferential and we will not disturb the court's ruling absent an abuse of discretion. *Id*. When a defendant requests a lesser-included offense instruction, the trial court must apply a three-part analysis

[1] We also note, at trial, Graves requested the instruction and objected to the trial court's refusal to give the instruction on grounds different from those raised on appeal. Specifically, Graves argued to the trial court that the instruction should be given because criminal recklessness is an inherently lesser-included offense of attempted murder. Tr. at 543-45. On appeal, Graves argues that criminal recklessness is a factually lesser-included offense of criminal recklessness. Failure at trial to state the ground for objection which is then asserted on appeal results in waiver of the claim of error. *Proffit v. State*, 817 N.E.2d 675, 684-85 (Ind. Ct. App. 2004), *trans. denied*.

set out in *Wright v. State*, 658 N.E.2d 563 (Ind. 1995). First, the trial court must determine if the alleged lesser-included offense is inherently included in the charged offense. *Wright*, 658 N.E.2d at 566. If the court determines that the offense is not inherently included, the trial court proceeds to step two and decides whether the alleged lesser-included offense is factually included in the crime charged. *Id*. at 567. However, if the alleged lesser-included offense is neither inherently nor factually included in the crime charged, a requested instruction on the alleged lesser-included offense should not be given and the trial court need not proceed to step three.[2] *See id*.

Employing the *Wright* analysis, we conclude that the trial court did not abuse its discretion when it denied Graves's oral request to instruct the jury on criminal recklessness. It is well settled that criminal recklessness is not an inherently included offense of attempted murder. *Ellis v. State*, 736 N.E.2d 731, 734 (Ind. 2000); *Wilson v. State*, 697 N.E.2d 466, 477 (Ind. 1998). The question of whether criminal recklessness is a factually included offense of attempted murder in a particular case must be discerned from the charging information.[3] *Ellis*, 736 N.E.2d. at 734. If the charging instrument alleges that the means used to commit the crime charged include all the elements of the alleged lesser-included offense, then the alleged lesser-included offense is factually included in the crime charged. *Wright*, 658 N.E.2d at 567. The State may foreclose instruction on a lesser offense that is not

[2] Step three of the *Wright* analysis provides that if the alleged lesser-included offense is either inherently or factually included, the trial court must look at the evidence in the case to see if there is serious evidentiary dispute about the elements distinguishing the greater from the lesser offense. *Wright*, 658 N.E.2d at 567.

[3] The charging information in Count I alleged in pertinent part that Graves "did attempt to knowingly or intentionally kill another human being, namely, Carl Wireman[.]" Appellant's App. at 22.

inherently included in the crime charged by omitting from the charging instrument factual allegations sufficient to charge the lesser offense. *Id.*

Here, the amended charging information did not include any element of reckless behavior, the essential element of the offense of criminal recklessness.[4] *See White v. State*, 849 N.E.2d 735, 741 (Ind. Ct. App. 2006) (holding that criminal recklessness not factually lesser-included offense of attempted murder when charging information lacked essential element of reckless behavior), *trans. denied.* Instead, Graves was charged only with knowing and intentional behavior. Because criminal recklessness was neither inherently nor factually included in the crime of attempted murder as charged, the trial court did not abuse its discretion in refusing to instruct the jury on criminal recklessness.

II. Self-Defense Instruction

Graves next asserts that the trial court erred when it *sua sponte* instructed the jury on self-defense. We agree but find the error harmless.

Any error in giving jury instructions is subject to a harmless error analysis. *Bayes v. State*, 791 N.E.2d 263, 264 (Ind. Ct. App. 2003), *trans. denied*; *see also* Ind. Trial Rule 61 (providing that at every stage of the proceeding, the court must "disregard any error or defect

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[4] In his brief, Graves refers to the language of an amended charging information dated November 17, 2008. As noted by the State, that charging information was omitted from the record on appeal. Because Graves has included only an amended charging information dated November 14, 2008, we will consider only the language presented in that information. A criminal defendant has a duty to provide a proper record for appeal, and failure to do so has been considered waiver of any alleged error based upon the absent material. *Cox. v. State*, 475 N.E.2d 664, 666 (Ind. 1985); *Lightcap v. State*, 863 N.E.2d 907, 911 (Ind. Ct. App. 2007). However, even assuming that the language of the omitted information is as Graves quotes it, our conclusion would remain the same.

in the proceeding which does not affect the substantial rights of the parties"). Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence, and the instruction would not likely have impacted the jury's verdict. *Randolph v. State*, 802 N.E.2d 1008, 1013 (Ind. Ct. App. 2004). An instruction error will result in reversal only when the reviewing court cannot say with complete confidence that a reasonable jury would have rendered the same verdict had the instruction not been given. *Schmidt v. State*, 816 N.E.2d 925, 933 (Ind. Ct. App. 2004), *trans. denied*.

The State concedes that it was error for the trial court to give a self-defense instruction to the jury in light of the fact that neither party requested the instruction and because the record does not support the giving of the instruction. It appears from our review of the record that the trial court's instruction on self-defense was not meant to be applied to Graves's behavior as a defense to his charge of attempted murder, but instead applied to Wireman's behavior as an explanation for his actions as the victim. A valid claim of self-defense is a legal justification for an otherwise criminal act. *Henson v. State*, 786 N.E.2d 274, 277 (Ind. 2003). However, Wireman did not need to defend his actions, as he was not charged with any criminal act by the State. Accordingly, we agree with both parties that the instruction on self-defense was unnecessary and inappropriate in the instant case. Having determined that the giving of the instruction was in fact error, we now turn to whether that error affected Graves's substantial rights.

Graves maintains that the giving of the instruction prejudiced him because it indirectly supported Wireman's testimony, thus giving Wireman's version of events more credence to

the jury. Our supreme court has disapproved of instructions that needlessly emphasize a particular witness, evidentiary fact, or phase of the case. *Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003). Nonetheless, in this case, we do not believe that the instruction, when read as a whole with all the instructions, remarkably emphasized either party's version of events. Indeed, the only version of events that may have been needlessly emphasized by instructing the jury that Wireman, the victim, may have been acting in self-defense, is Graves's version. At trial, the defense maintained that, during Graves's attack on Wireman, Wireman managed to wrestle away one of the guns and shoot Graves in the face. The State's version was always that Graves attacked Wireman but that Graves shot himself after Wireman had retreated inside the residence. Therefore, any prejudice would have been suffered by the State, as the instruction indirectly supported Graves's version of events. Based upon the record, Graves's conviction for attempted murder is supported by ample evidence, and we find it unlikely that the instruction impacted the jury's verdict. Graves has not demonstrated that the trial court's erroneous instruction affected his substantial rights. The error was harmless.

III. Sentence

Finally, Graves contends that his thirty-five year sentence for class A felony attempted murder is inappropriate. We disagree.

We first address Graves's contention that the trial court failed to find several mitigating factors supported by the record. Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.

Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Anglemyer v. State*, 868 N.E.2d 482, 493 (Ind. 2007). If the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. *Id*.

Here, the trial court found Graves's lack of prior criminal history as a significant mitigating factor. The trial court also considered the hardship incarceration would place on Graves's minor daughter but decided not to give mitigating weight to that circumstance because the court determined that Graves showed no concern for his daughter when he committed his crime. In addition to these mitigators, the court found Graves's commission of his crime in the knowing presence of Wireman's young daughter a significant aggravating circumstance and further found as an aggravating factor Graves's continued lack of remorse shown for his attempted murder of Wireman.

Graves asserts that the court failed to find as mitigating factors that he never truly intended to kill Wireman and, due to the unique circumstances of the instant crime, it is unlikely that Graves will commit another offense. Neither of these factors is supported by the record. First, to find that Graves lacked the intent to kill Wireman would be inconsistent with the jury's verdict. Moreover, due to Graves's history of adultery with Wireman's wife and his desire to "get [Wireman] out of the way," the circumstances of this crime could very well reoccur. Tr. at 624. We cannot say that the trial court abused its discretion when it

declined to find the additional mitigating factors advanced by Graves. To the extent that Graves is claiming that the trial court abused its discretion in balancing the aggravators and mitigators, that claim is not available for appellate review. *See Anglemyer*, 868 N.E.2d at 494.

Still, Graves invites this Court to exercise our power to revise his sentence. The sentencing range for a class A felony is a fixed term of between twenty years and fifty years, with the advisory sentence being thirty years. Ind. Code § 35-50-2-4. Under our advisory sentencing scheme, a court may impose any legal sentence "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). When reviewing a sentence, we recognize that the advisory sentence is the starting point the Legislature has selected as an appropriate sentence for the crime committed. *Weiss v. State*, 848 N.E.2d 1070, 1072 (Ind. 2006).

The Indiana Constitution authorizes this Court to review and revise sentences to the extent provided by the Supreme Court rules. Ind. Const. art. VII, § 6. We may revise a sentence authorized by statute if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); *Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). In fact, this Court may revise any sentence we find inappropriate "even where the trial court has been meticulous in following the proper procedure in imposing a sentence." *Childress*, 848 N.E.2d at 1079-80. The defendant bears the burden to persuade the appellate court that his or her sentence is inappropriate. *Id.* at 1080.

Regarding the nature of the offense, the thirty-five year sentence imposed by the trial court was clearly within the prescribed statutory range for a class A felony. While the sentence imposed was five years more than the thirty-year advisory sentence, the circumstances of the crime here were especially violent and troubling. Regarding the character of the offender, the instant offense was carried out through careful planning. Graves's lack of true remorse indicates that he fails to understand the gravity of his actions. We are not persuaded that the nature of the offense or character of the offender justifies revising Graves's sentence.

We affirm.

MAY, J., and BROWN, J., concur.