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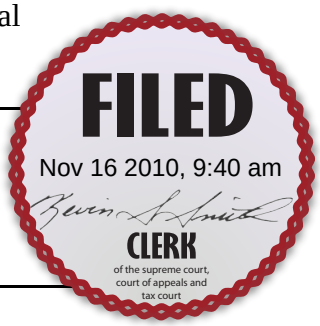

IN THE COURT OF APPEALS OF INDIANA

JAMARR DA-JUAN WILLIAMS,	)	
	)	
Appellant- Defendant,	)	
	)	
vs.	)	No. 45A03-1001-CR-39
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Plaintiff,	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
Cause No. 45G02-0805-MR-4

November 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Jamarr Da-Juan Williams was convicted, following a jury trial, of voluntary manslaughter, a Class A felony, battery, a Class C felony, and attempted battery, a Class C felony, and sentenced to thirty years. Williams appeals and raises two issues, which we restate as: 1) whether the trial court abused its discretion by refusing to instruct the jury regarding involuntary manslaughter as a lesser included offense of murder; and 2) whether the State presented sufficient evidence to rebut Williams's claim of self-defense. Concluding the trial court did not abuse its discretion by denying Williams's requested instruction, and the evidence is sufficient to rebut his self-defense claim, we affirm.

Facts and Procedural History[1]

On the night of May 18, 2008, twenty-year-old Williams and his friend Wilbur Jenkins were socializing and Williams agreed to give Jenkins a ride home. Jenkins had an injury that required him to walk on crutches. After midnight, Williams and Jenkins arrived at the latter's house in Merrillville and Williams pulled his gray van into the driveway. Two other cars were parked in the driveway. Williams and Jenkins sat in the van for fifteen to twenty minutes, talking and listening to music. Meanwhile, three males, D.A., D.W., and A.C.,[2] were walking around the neighborhood "checking cars," that is, trying the doors of vehicles parked along the street so they could steal money from unlocked vehicles. Transcript at 151.

[1] We heard oral argument on October 19, 2010, at Valparaiso High School in Valparaiso, Indiana. We extend our thanks to the school's faculty, staff, and students for their hospitality and to counsel for their excellent oral advocacy.

[2] Initials are used in place of the victims' names because D.A. was seventeen at the time, D.W. was fifteen, and A.C. was eighteen.

D.A., D.W., and A.C. approached the Jenkins property, where Williams and Jenkins were still sitting in the van. According to D.W., D.A. went onto the lawn between the driveway and the house, A.C. approached the van, and D.W. remained in the street. Then A.C. saw that someone was inside the van, turned back toward the street, and told his companions to run. As A.C. and D.W. started to run, somebody exited the van and began shooting. D.W. heard gunshots but did not see a gun or who was shooting. D.W. testified that he, D.A., and A.C. were all unarmed that night and none of them shot at anyone. D.W. further testified A.C. never touched the van.

Jenkins and Williams each testified to a different account of events. According to Jenkins, Williams pointed out to him the approach of three males in dark clothing. They then watched as one of the males walked up to the van and tried the driver's side door, another walked partway up the driveway, and the third remained in the street. After the first male was unable to open the van, and apparently did not notice Jenkins or Williams inside, he proceeded to try the other cars in the driveway and opened one of the cars. At that point, Jenkins got out of the van and said something to the effect of, "hey, what you all doing." Id. at 579. Hearing no response, Jenkins used his crutches to hobble across the yard toward the door of the house. As he was doing so, according to Jenkins, the two males who were in the driveway also started walking toward the house. Jenkins then saw one of the males reaching toward his waist on the right side, "like he had a gun," although Jenkins did not actually see a gun, only a dark object. Id. at 581. As Jenkins opened the door of the house to get inside, he heard the first of two series of gunshots. Jenkins did not see who was shooting, but heard "two different sounds, two different

weapons." Id. at 622. The following morning, Jenkins saw bullet holes in the outside of the house that were not there previously.

Williams's account differed from Jenkins's in the following details. Williams testified the three males "ran towards my van and pulled on the passenger door and the slider door." Id. at 951. Then one of the males approached the other cars in the driveway while the other two tried the van's driver's side door. After Jenkins got out of the van, the two males who were pulling on the driver's side door "took off running" toward the street. Id. at 952, 956. Williams also got out of the van, holding the handgun which he had a license to carry, and as Jenkins was moving toward the door of the house, Williams said to the male who was still by the other cars in the driveway, "what are you doing back there and who are you?" Id. at 953. When Jenkins reached the door of the house, Williams heard two or three gunshots coming from the direction of the street. Williams "returned fire" in that direction. Id. at 954. As he was doing so, the male who was still near the other two cars in the driveway ran towards Williams. Williams ran to the far side of the van and tried to keep the van between him and the male. Williams saw the male "reaching for something" that he thought was a gun, but did not actually see a gun. Id. at 958. As Williams came to the door of the van, he fired his handgun several more times because he thought the male was about to start shooting. He then got inside the van and drove away from the scene. Williams testified that when he fired his gun, he "didn't really try to fire at a target. [He] was just trying to get out of the way." Id. at 962. Williams admitted he fired a couple of shots the first time he "returned fire," and "possibly more than five" shots the second time he opened fire. Id. at 1012. Williams

testified he had no knowledge that anyone was struck or killed until the police informed him that someone had died.

Anthony Jenkins, Jenkins's father who was home at the time, testified he heard gunshots, looked outside, and saw three people running away. According to Anthony, no bullets entered the home but a bullet struck the outside of the home and "tore the vinyl off." Id. at 531. As testified to by Merrillville police officer Jeff Rice, all of the bullets found at the scene were of the same caliber, and all of the casings recovered from the scene matched the caliber of the handgun recovered from Williams.

D.A. suffered three gunshot wounds to his torso and died from those injuries. According to a medical examiner's testimony, two of the bullets entered through D.A.'s back and the other entered through his side. Each of the bullets inflicted a "serious injury" to D.A.'s lung, liver, and spine respectively. Id. at 351-52. D.W. was struck by a bullet in the leg. A.C. was apparently uninjured, as was Williams.

The State charged Williams with Count I, murder of D.A. "by means of a handgun, a deadly weapon"; Count II, attempted murder of D.W. "by shooting at and wounding [D.W.] with a handgun, a deadly weapon"; Count III, attempted murder of A.C. "by shooting at [A.C.] with a handgun, a deadly weapon"; Count IV, battery as a Class C felony by "knowingly or intentionally, and in a rude, insolent, or angry manner, touch[ing] [D.W.] by means of a handgun, a deadly weapon"; and Count V, attempted battery as a Class C felony by "knowingly or intentionally, and in a rude, insolent, or angry manner, attempt[ing] to touch [A.C.] by means of a handgun, a deadly weapon." Appellant's Appendix at 8-9.

A six-day jury trial was held at which D.W., Jenkins, Williams, Anthony Jenkins, and Officer Rice, among others, testified.[3] At the close of trial, the court denied Williams's verbal request to have the jury instructed regarding involuntary manslaughter as a lesser included offense of murder. Williams did not tender a written instruction regarding involuntary manslaughter. The colloquy regarding Williams's verbal request was as follows:

> By the Court: * * * Okay. Let's go back to involuntary manslaughter. How do you get the involuntary manslaughter in, it's not inherently included offense of any of this, of the murder count, how do you get this on the facts? There's no testimony that Jamarr Wilson [sic] was an expert marksman so much so that he's actually able to wound someone at a distance with a gun as opposed to killing them. How under the facts of this case can he attempt to batter somebody shooting into the night and wounding him? How do you get there?
>
> By [defense counsel]: If the jury found he had no intent to kill, but the jury could also find that he intended to hit or to strike him, that's how we get there.
>
> By the Court: Well, the jury's going to make their . . . inferences and conclusions based on the facts, that to me is, it's not supported by the facts of the case and I think it's a leap of logic that I don't know that I will let them take that he intended to batter the boys. And it also conflicts with the instruction on intent to kill can be inferred from using a handgun in a manner reasonably calculated to cause death. . . . Does the State have some comments on that?
>
> By [the State]: I don't think the facts support involuntary manslaughter and I don't think it's inherently included.
>
> By the Court: I'm not going to give that one. I'll note defense objection.

[3] A neighbor, Rudy Matt, testified to hearing three series of gunshots around 1:25 a.m. An experienced gun owner, Matt testified the three series of shots did not sound like the same weapon. Specifically, the third series differed in sound from the first.

Tr. at 1103-04. However, the jury was instructed regarding voluntary manslaughter and reckless homicide as lesser included offenses of murder, and criminal recklessness as a lesser included offense of attempted murder.

With respect to Count I, the jury found Williams guilty of voluntary manslaughter, a Class A felony; with respect to Count II, guilty of criminal recklessness, a Class C felony; with respect to Count III, guilty of criminal recklessness, a Class D felony; and with respect to Counts IV and V, guilty as charged. The trial court's sentencing order "merge[d] Count II into Count IV and Count III into Count V based on double jeopardy considerations." Appellant's App. at 62. The trial court imposed concurrent sentences of thirty years on Count I and four years each on Counts IV and V. Williams now appeals.

Discussion and Decision

I. Denial of Instruction

A. Standard of Review

The State argues Williams waived his claim of error in the denial of an involuntary manslaughter instruction by not tendering a written instruction to the trial court as required by Indiana Criminal Rule 8 and Trial Rule 51(E). Williams acknowledges he verbally requested an involuntary manslaughter instruction but did not tender one. The general rule is that failure to tender an instruction results in waiver of any error in the trial court's failure to give an instruction. Ortiz v. State, 766 N.E.2d 370, 375 (Ind. 2002). Our supreme court has stated the reason for this rule: "[A] tendered instruction is necessary to preserve error because, without the substance of an instruction upon which

to rule, the trial court has not been given a reasonable opportunity to consider and implement the request." Scisney v. State, 701 N.E.2d 847, 848 n.3 (Ind. 1998).

The trial court's colloquy regarding Williams's verbal request for an involuntary manslaughter instruction shows the trial court understood the substance of the request and was able to consider it. The trial court did consider and clearly denied Williams's requested instruction on the merits; it did not mention lack of proper tender as a reason for denying the instruction. Thus, the purpose of the waiver rule would not be served by applying the rule in the present case, and because the trial court denied the instruction on the merits and there is no dispute as to the substance of Williams's requested instruction, we have a sufficient record to permit meaningful review. For the same reasons, this case differs from Ketcham v. State, 780 N.E.2d 1171 (Ind. Ct. App. 2003), trans. denied, in which we held waiver resulted where the defendant verbally requested a lesser included offense instruction and the trial court cited the lack of a written tender as the reason for rejecting the request. Id. at 1177. While we emphasize it would have been the better practice for Williams's counsel to have tendered an involuntary manslaughter instruction in the manner required by our Criminal and Trial Rules, and that failure to do so generally exposes a defendant to waiver of claimed error, we conclude that in the circumstances of this case Williams's claim of error was not waived. See McDowell v. State, 885 N.E.2d 1260, 1262-63 (Ind. 2008) (concluding issue of improper jury instruction was preserved for appeal when, despite defendant's failure to specifically identify grounds for objection, record showed trial court "gave consideration to

essentially the same issue that [was] presented on appeal"). We therefore discuss the appropriate standard for reviewing Williams's claim on the merits.

In determining whether to give a lesser included offense instruction, trial courts apply the three-part test set forth in Wright v. State, 658 N.E.2d 563 (Ind. 1995):

> First, a trial court must compare the statute defining the crime charged with the statute defining the alleged lesser included offense. If (a) the alleged lesser included offense may be established by proof of the same material elements or less than all the material elements defining the crime charged, or (b) the only feature distinguishing the alleged lesser included offense from the crime charged is that a lesser culpability is required to establish the commission of the lesser offense, then the alleged lesser included offense is inherently included in the crime charged. * * *
>
> Second, if a trial court determines that an alleged lesser included offense is not inherently included in the crime charged under step one, then it must compare the statute defining the alleged lesser included offense with the charging instrument in the case. If the charging instrument alleges that the means used to commit the crime charged include all of the elements of the alleged lesser included offense, then the alleged lesser included offense is factually included in the crime charged . . . .
>
> Third, if a trial court has determined that an alleged lesser included offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case by both parties. If there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute, a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense.

Id. at 566-67 (citations and quotation omitted; emphasis in original).

When a trial court has made a finding on the existence or lack of a serious evidentiary dispute, we review the trial court's rejection of an instruction for an abuse of discretion. Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998). Here, the trial court in its colloquy discussed the evidence in the case and found there was no serious evidentiary

dispute as to involuntary manslaughter: "it's not supported by the facts of the case and I think it's a leap of logic that I don't know that I will let [the jury] take that [Williams] intended to batter the boys." Tr. at 1104. Our standard of review is therefore abuse of discretion.

B. Involuntary Manslaughter

As the parties agree, involuntary manslaughter is not an inherently included offense of murder but can be a factually included offense of murder. Wright, 658 N.E.2d at 569 (citing Lynch v. State, 571 N.E.2d 537 (Ind. 1991)).

> Murder is defined as knowingly or intentionally killing another human being. Ind. Code § 35-42-1-1(1). Involuntary manslaughter is defined as occurring when a person kills another human being while committing or attempting to commit a battery, Ind. Code § 35-42-1-4, and contemplates an incidental killing that occurs during a battery.[4] Battery is defined as knowingly or intentionally touching another person in a rude, insolent, or angry manner. Ind. Code § 35-42-2-1. Here, the killing was obviously accomplished with a touching by [the defendant] and, therefore, involuntary manslaughter is a lesser included offense of murder.

Lynch, 571 N.E.2d at 538-39 (citation omitted; footnote added). "To kill with a gunshot is to kill by a touching." Miller v. State, 694 N.E.2d 770, 774 (Ind. Ct. App. 1998), trans. denied. Here, the charging information alleged Williams killed D.A. "by means of a handgun, a deadly weapon." Appellant's App. at 8. Because the charging information alleged Williams's use of a handgun, a touching that would satisfy the elements of battery, involuntary manslaughter is a factually included offense of murder in this case. See Evans v. State, 727 N.E.2d 1072, 1081 (Ind. 2000) (concluding charging information

[4] The involuntary manslaughter statute has been broadened to include, in addition to a killing while committing or attempting to commit battery, a killing while committing or attempting to commit a Class C or Class D felony, or a Class A misdemeanor, that "inherently poses a risk of serious bodily injury." Ind. Code § 35-42-1-4(c).

"did assert a battery, and involuntary manslaughter was a factually included lesser offense of murder," where charging information alleged killing "by means of a knife, a deadly weapon"); cf. Champlain v. State, 681 N.E.2d 696, 702 (Ind. 1997) (concluding involuntary manslaughter was not factually included in murder charge where charging information omitted details of the crime, alleged only a knowing killing, and thus "did not assert a battery").

We therefore proceed to the third step of the Wright test, whether there was a serious evidentiary dispute about the intent element that distinguishes murder and voluntary manslaughter from involuntary manslaughter. That is, was there a serious evidentiary dispute as to whether Williams killed D.A. knowingly or intentionally? It was undisputed that Williams fired several shots in a row in the direction of D.A.; Williams admitted the number was "possibly more than five." Tr. at 1012. It was also undisputed that three of those shots struck D.A. in the torso, two of which entered through D.A.'s back, which would support an inference D.A. had his back turned to Williams or was beginning to retreat when Williams continued to fire his handgun. Each of the shots that struck D.A. caused a serious injury. It was after midnight and the area was dark, but Williams's testimony was to the effect he was able to see and follow D.A.'s movements. While Williams's shots that struck D.A. were not at point blank range, Williams and D.A. were both in the vicinity of the driveway, making those shots at a closer range than the shots that struck D.W. and A.C., who according to Williams had already retreated toward the street.

Williams testified that in firing his handgun, he "didn't really try to fire at a target." Id. at 962. He also testified his intent in firing was "to get out of the way." Id. When coupled with the lack of any testimony that Williams intended merely to strike or batter D.A., Williams's testimony regarding his intent goes more to his claim of self-defense than to support a claim that the killing was involuntary, i.e., not knowing or intentional. Williams's testimony about not aiming at a target would support a claim that the killing was not intentional, but not necessarily that it was not a knowing killing, given the undisputed evidence that Williams knowingly used a handgun to fire multiple shots in D.A.'s direction. See Ind. Code § 35-41-2-2 (providing a person engages in conduct "knowingly" if "he is aware of a high probability that he is doing so," even if it is not his "conscious objective to do so"); McDowell, 885 N.E.2d at 1263 (noting that knowing or intentional killing may be inferred from use of a deadly weapon in a manner likely to cause death or great bodily injury). This case therefore differs from Lynch, where a serious evidentiary dispute existed warranting an involuntary manslaughter instruction because, among other things, the defendant fired a single shot that entered through the victim's upper arm and the defendant testified he intended only to injure the victim. 571 N.E.2d at 539. For these reasons, the trial court did not abuse its discretion by finding there was no serious evidentiary dispute to warrant giving an involuntary manslaughter instruction.

II. Sufficiency of the Evidence

A. Standard of Review

"We review a challenge to the sufficiency of the evidence to rebut a claim of self-defense using the same standard as for any claim of insufficient evidence." Carroll v. State, 744 N.E.2d 432, 433 (Ind. 2001). That is, we will affirm the conviction unless, considering only the evidence and reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of witnesses, no reasonable fact-finder could have found the State disproved self-defense beyond a reasonable doubt. Id.

B. Self-Defense

"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." Ind. Code § 35-41-3-2(a). A person is justified in using deadly force and does not have a duty to retreat "if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony." Id. Further, a person is justified in using reasonable force, including deadly force, and does not have a duty to retreat "if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle." Ind. Code § 35-41-3-2(b).

In order to prevail upon a self-defense claim in a homicide prosecution, 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. Wilson v. State, 770 N.E.2d 799, 800 (Ind. 2002). When self-defense is raised and finds support in the evidence, the State must disprove at least one of these elements beyond a reasonable doubt. McEwen v. State, 695 N.E.2d 79, 90 (Ind. 1998).

The evidence favorable to the verdict is D.W.'s testimony that Williams opened fire without first being fired upon and even before A.C. or his companions could place their hands on the door of the van. In these circumstances, Williams did not have a reasonable fear of death or great bodily harm because there is no evidence or contention that, prior to checking the doors of the van, any of the victims brandished a weapon or made threatening gestures toward Williams or Jenkins. Also, D.W.'s testimony is that Williams fired multiple shots while the victims were running away, retreating in the direction of the street. It was undisputed that two of Williams's shots that struck D.A. entered through his back. A reasonable inference is that D.A. had his back turned to Williams and was beginning to retreat when Williams continued to fire his handgun. Under these facts, Williams's use of force was excessive and his right to self-defense was thereby extinguished. See Geralds v. State, 647 N.E.2d 369, 373 (Ind. Ct. App. 1995) (concluding any right to use deadly force was extinguished as a matter of law when trespasser was in the process of fleeing from defendant's presence yet defendant continued to fire multiple shots), trans. denied. Despite the contrary testimony of Williams and other witnesses, which the jury was not required to believe, D.W. testified that he, D.A., and A.C. were all unarmed and did not fire any shots. All of the bullet

casings recovered from the scene matched the caliber of Williams's gun. For these reasons, the State presented sufficient evidence from which the jury could have found Williams's self-defense claim disproved beyond a reasonable doubt.

Conclusion

The trial court did not abuse its discretion by finding there was no serious evidentiary dispute to warrant giving an involuntary manslaughter instruction. Further, the evidence is sufficient to rebut Williams's claim of self-defense. His convictions are therefore affirmed.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.