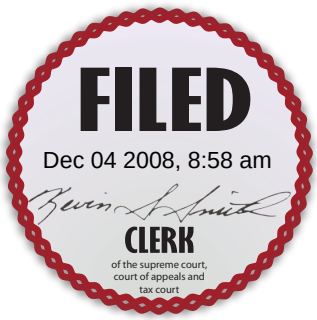

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IN THE
COURT OF APPEALS OF INDIANA

JACK D. MCARDLE III,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A01-0803-CR-125
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Kenneth G. Todd, Judge
Cause No. 53C03-0607-MR-321

DECEMBER 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

Jack D. McArdle III appeals his conviction by jury of murder. We affirm.

The sole issue for our review is whether the trial court erred in refusing to give McArdle's tendered voluntary manslaughter jury instruction.[1]

The facts most favorable to the verdict reveal that in June 2006, McArdle and Nicole Thompson broke off their three-month relationship. On June 12, Thompson spent the night at her friend John Butler's apartment. The following morning, McArdle told two friends that he was going to kill Butler. First, he told his cousin Robert New that he was going to stab Butler with the knife in his pocket when Butler came out of his apartment. New lived across the street from Butler. McArdle also told Jessica Grubb what he planned to do.

At approximately 7:30 a.m., Butler and Thompson left Butler's apartment. As they walked down the sidewalk together, McArdle crossed the street and approached them. McArdle talked to Butler for a few seconds, and Butler turned to walk away. McArdle told Butler not to turn away and to face him like a man. McArdle and Butler began to walk down the sidewalk together. New noticed that McArdle appeared to have calmed down, and just as it appeared that the two men were getting along, McArdle pulled the knife out of his pocket and stabbed Butler in the neck. Butler ran around a

[1] McArdle also argues that the trial court erred when it "refused to recuse itself due to a conflict in interest." Appellant's Br. at 14. According to McArdle, the trial court judge had a conflict of interest because he had previously presided over criminal matters involving the victim's daughter. However, as the State points out, there is no evidence in the record of the proceedings that McArdle ever filed a motion asking the judge to recuse himself or that he raised the conflict of interest argument to the trial court judge. Further, Indiana law presumes that a judge is unbiased. *McDonald v. State*, 861 N.E.2d 1255, 1260 (Ind. Ct. App. 2007), *vacated in part on other grounds.* To rebut this presumption, the defendant must show actual bias or prejudice that places him in jeopardy and makes a fair trial impossible. *Id.* McArdle has failed to show or even allege bias or prejudice. Under these circumstances, we find no error.

dumpster to evade McArdle and fell to his knees. McArdle followed Butler and when he reached him, repeatedly stabbed him in the back.

McArdle went to a friend's house and told the friend that he had stabbed Butler in the neck after waiting for him to come out of his apartment. When McArdle was subsequently pulled over by police, he told the officers details about the stabbing. Specifically, McArdle told the officers that he stabbed Butler in the neck, and thought it was "neat" that every time Butler's heart would pump, blood would squirt out of his neck. Tr. at 396. McArdle further explained to the officers that when Butler fell to his knees, McArdle stabbed him in the back. McArdle continued that one time his knife stuck in Butler's back and he had to use his foot or knee to remove it. He told the officers he wished Butler were alive so that he could kill him again.

The following day, McArdle stated as follows during a police interview:

> . . . that night I started thinking , and I thought, you know what, tomorrow, or, tonight is his last night on the f---ing earth, I'm killing him. Next time I see him, the first chance I get, I'm f---ing executing him. And . . . I stayed up all f---ing night walking around . . . . All night, and not one time did it enter my mind, oh, maybe you shouldn't do it – so to me that says God thought it was right. . . . [And the next day] he was standing like . . . right beside me . . . . And I just looked at him. . . . And I pulled a knife out of my back pocket and stuck it in his f---ing neck. And he took off running. . . . But what was funny is when he was running, like he was almost drunk, and every time his heart beat it would spray. (*sound*). You know what I mean. And when he hit the ground, ... I started stabbing him in the back. . . . I killed him, I knew I was going to kill him, and I wanted to kill him, and do I have remorse or regret? Yeah, that I can't bring him back to life and kill him again. That's what I want to do.

Appellant's App. at 200-202.

The State charged McArdle with murder. At trial, McArdle tendered a voluntary manslaughter instruction. He explained that he was unable to react rationally when he saw the "look in [Butler's] eyes" while they were talking. Tr. at 750. Butler also had his hand in his pocket, and McArdle explained that he believed Butler had a knife in the pocket. The trial court found insufficient evidence of sudden heat and refused to give the instruction. McArdle appeals.

McArdle contends that the trial court erred in refusing to give his tendered voluntary manslaughter instruction. We review a trial court's decisions regarding jury instructions for an abuse of discretion. *Stringer v. State*, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). In reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction correctly states the law; whether there is evidence in the record to support the giving of the instruction; and whether the substance of the tendered instruction is covered by other instructions that are given. *Smith v. State*, 777 N.E.2d 32, 34 (Ind. Ct. App. 2002), *trans. denied.*

When the defendant requests a lesser included offense instruction, the trial court is required to determine whether the offense is either inherently or factually included in the charged offense. *Wright v. State*, 658 N.E.2d 563, 566 (Ind. 1995). If the offense is either inherently or factually included, the court must give the instruction if there is a serious evidentiary dispute about the elements distinguishing the offenses. *Lemond v. State*, 878 N.E.2d 384, 389 (Ind. Ct. App. 2007), *trans. denied.* The defendant is not entitled to an instruction on a lesser included offense unless the evidence would have warranted a jury's finding that the lesser offense was committed while the greater was

not. *Johnson v. State*, 518 N.E.2d 1073, 1077 (Ind. 1988). If a serious evidentiary dispute exists regarding the distinguishing element, it is reversible error for the trial court to refuse the instruction. *Brown v. State*, 770 N.E.2d 275, 280 (Ind. 2002).

A person commits voluntary manslaughter when he knowingly or intentionally kills another while acting under sudden heat. Ind. Code § 35-42-1-3(a). The existence of sudden heat is a mitigating factor that reduces what would otherwise be murder to voluntary manslaughter. Ind. Code § 35-42-1-3(b). Therefore, voluntary manslaughter is inherently a lesser-included offense of murder, distinguished by the factor that the defendant killed under sudden heat. *Earl v. State*, 715 N.E.2d 1265, 1267 (Ind. 1999).

"Sudden heat" is characterized as anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary person, preventing deliberation and premeditation, excluding malice, and rendering a person incapable of cool reflection. *Clark v. State*, 834 N.E.2d 153, 158 (Ind. Ct. App. 2005). To establish that the defendant acted in sudden heat, the defendant must show sufficient provocation to engender passion. *Id.* An instruction on voluntary manslaughter is supported if there exists evidence of sufficient provocation to induce passion that renders a reasonable person incapable of cool reflection. *Id.*

Here, our review of the evidence reveals that the morning of the murder, McArdle told two friends that he intended to kill Butler. Further, after McArdle approached Butler and told him not to turn away, the two men walked down the sidewalk together. Just as it appeared that the two men were getting along, McArdle stabbed Butler in the neck. McArdle later told police officers that he planned to kill Butler and that he would kill him

again if he could. This is premeditation, not sufficient provocation to engender passion.[2] The trial court did not err in refusing to give the voluntary manslaughter instruction.

Affirmed.

CRONE, J., and BROWN, J., concur.

[2] Neither is a look in the eyes or a hand in a pocket sufficient provocation to engender passion.