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IN THE COURT OF APPEALS OF INDIANA

DAKEVEE WIGGINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0905-CR-222
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause Nos. 71D03-0811-MR-27
71D04-0104-CF-158

December 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Dakevee Wiggins appeals his conviction for murder.[1] Wiggins raises two issues, which we revise and restate as:

I. Whether the evidence is sufficient to sustain Wiggins's conviction for murder; and

II. Whether the trial court abused its discretion when it refused to instruct the jury on reckless homicide.

We affirm.

The relevant facts follow. At some point, Lakisha Wade and Quest Jackson were in a relationship. Some time later, Wiggins and Lakisha were in a relationship for two years. There were problems in Wiggins and Lakisha's relationship because Lakisha knew that Wiggins was seeing another woman. On the evening of November 1, 2008, Jackson, Lakisha, Tiffany Wade, and Adrian Vanison, were "hanging out" at Tiffany's home in South Bend, Indiana. Transcript at 241. They played cards and drank gin. At some point, Wiggins went to Tiffany's house in his mother's "green Lumina." Id. at 275. Wiggins knocked on Tiffany's door, but no one answered the door, and Wiggins left. Wiggins returned "five or twenty minutes" later, knocked on the door again, and said that he wanted to talk to Lakisha. Id. at 274.

Around 7:00 a.m. the next morning, Wiggins knocked on Tiffany's door and said that he wanted Lakisha. Tiffany told Wiggins that Lakisha was not going to come to the door, and Wiggins went to his white truck, came back to the door, told Tiffany, "just tell

[1] Ind. Code § 35-42-1-1 (Supp. 2007).

her she gotta come home," and eventually left. Id. at 248. Wiggins then kept driving past Tiffany's house in his white truck.

Around 10:00 a.m., Wiggins left his mother's house in her green Lumina. Between 10:00 a.m. and 10:30 a.m., Jackson and Vanison left Tiffany's house. Jackson and Vanison walked toward the house of Vanison's sister and approached the intersection of Johnson and Linden Streets. Wiggins pulled up in a car, slowed down, and began shooting. Vanison jumped and ducked but did not "go all the way down to the ground." Id. at 309. Wiggins stopped shooting and left. Jackson was shot twice, and fell to the ground. Vanison called the police. Jackson later died as a result of the gunshot wounds.

The police discovered six shell casings at the scene. The police discovered a bullet hole in a house on the northeast corner of Johnson and Linden. The police also believed that a bullet ricocheted off of a kettle barbecue grill.

Vanison identified Wiggins in a photo lineup. The police went to the home of Bernice Hamilton, Wiggins's mother, and received permission from her to search her green Lumina. The police discovered a casing "between the frame rail of the car and the seat frame." Id. at 567. While the police were at the home of Wiggins's mother, Wiggins arrived, and the police patted him down and discovered a box of live ammunition that had missing bullets. The shell casings found at the scene, the shell casing found in the green Lumina, and the ammunition found on Wiggins were all .38 caliber. The casings found at the scene and the one found in the Lumina were fired from the same firearm. The bullet found at the scene and the bullets in Jackson's body were

the same brand and type of product as some of the live cartridges found on Wiggins's person.

The State charged Wiggins with murder and attempted murder as a class A felony.[2] On February 2, 2009, Wiggins filed a notice of alibi.[3] During the jury trial, Hamilton testified that Wiggins left her house around 10:00 a.m. in her green Lumina to pick up his brother, Terrence Wiggins. Hamilton also testified that Wiggins returned to her house with Terrence about one-half hour later. She further testified that Wiggins visited her at her friend's house that morning. Terrence also testified regarding Wiggins's whereabouts that morning.

The trial court and counsel held a final instruction conference, which was not transcribed. After the conference, the trial court attempted to make a record of the conference and stated that Wiggins's defense counsel offered an instruction on a lesser included offense of reckless homicide.[4] The trial court stated that there was not a serious evidentiary dispute and denied Wiggins's motion to "submit – or to have the jury receive instructions" on the offense of reckless homicide. Id. at 606.

The jury found Wiggins guilty of murder and not guilty of attempted murder. The trial court sentenced Wiggins to sixty-one years in the Department of Correction. The trial court also found that Wiggins violated his probation under a different cause number

[2] The record does not contain a copy of the charging information.

[3] The record does not contain a copy of the notice of alibi.

[4] Wiggins's brief includes two proposed instructions relating to reckless homicide.

and sentenced Wiggins to serve four years under that cause number. The trial court ordered that the sentences be served consecutively.

I.

The first issue is whether the evidence is sufficient to sustain Wiggins's conviction for murder. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

The offense of murder is governed by Ind. Code § 35-42-1-1, which provides that "[a] person who . . . knowingly or intentionally kills another human being . . . commits murder, a felony." Thus, the State was required to prove beyond a reasonable doubt that Wiggins knowingly or intentionally killed Jackson.

Wiggins "challenges the sufficiency of evidence on the issue of his identification." Appellant's Brief at 13. Wiggins argues that Vanison "did not get a good look at the shooter's face" and that "[i]n light of Mr. Wiggins [sic] several alibi witnesses, Mr. Vanison's identification lacks sufficient weight to support a criminal conviction." Id.

"Inconsistencies in identification testimony go only to the weight of that testimony; it is the task of the jury to weigh the evidence and to determine the credibility of the witnesses." Emerson v. State, 724 N.E.2d 605, 610 (Ind. 2000), reh'g denied. We do not weigh the evidence or resolve questions of credibility when determining whether the identification evidence is sufficient to sustain a conviction. Id. Rather, we look to the evidence and the reasonable inferences therefrom which support the verdict of the jury. Id. Wiggins's argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Id.; Drane, 867 N.E.2d at 146.

The record reveals that Vanison identified Wiggins in a photo lineup and also identified Wiggins as the shooter during the trial. On cross examination, Vanison was asked whether he told investigators that he "really couldn't see the shooter's face," and Vanison answered affirmatively. Transcript at 323. However, on redirect examination, the following exchange occurred:

Q Okay. And then you went to homicide. You said, hey, I don't know if I really got a very good look at this guy's face; is that right?

A Yes.

Q Okay. They showed you the lineup anyway and asked you to try?

A Yes.

Q And you picked one of the fellows out and said that's the guy that shot?

A Yes.

Q Okay. Were you sure then?

A Yes.

Q Okay. And when you pointed out this guy here in the courtroom today, are you sure now?

A Yes.

Id. at 324-325.

The record also reveals that the police discovered six shell casings at the scene. The police searched the green Lumina of Wiggins's mother and discovered a casing "between the frame rail of the car and the seat frame." Id. at 567. The police also patted Wiggins down and discovered a box of live ammunition that had missing bullets. The shell casings found at the scene, the shell casing found in the green Lumina, and the ammunition found on Wiggins were all .38 caliber. The casings found at the scene and the one found in the Lumina were fired from the same firearm. Further, the bullet found at the scene and the bullets in Jackson's body were the same brand and type of product as some of the live cartridges found on Wiggins's person.

Based upon our review of the record, we conclude that evidence of probative value exists from which the jury could have found that Wiggins knowingly killed Jackson. See Emerson, 724 N.E.2d at 610-611 (holding that the evidence was sufficient to support the jury's conclusion that the defendant was an accomplice).

II.

The next issue is whether the trial court abused its discretion when it refused to instruct the jury on reckless homicide. We apply a three-step analysis in determining

whether a defendant was entitled to an instruction on a lesser included offense. Wright v. State, 658 N.E.2d 563, 566-567 (Ind. 1995). We must determine: (1) whether the lesser included offense is inherently included in the crime charged; if not, (2) whether the lesser included offense is factually included in the crime charged; and if either, (3) whether there is a serious evidentiary dispute whereby the jury could conclude the lesser offense was committed but not the greater offense. Id. If the "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 567. When the trial court makes a finding that a serious evidentiary dispute does not exist, we will review that finding for an abuse of discretion. Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998). If the trial court rejects the tendered instruction on the basis of its view of the law, as opposed to its finding that there is no serious evidentiary dispute, appellate review of the ruling is de novo. Id. Here, the trial court found that no serious evidentiary dispute existed. Thus, we will review that finding for an abuse of discretion.

Reckless homicide is an inherently included lesser offense of murder, as the only element distinguishing the two is the requisite culpability. See Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Miller v. State, 720 N.E.2d 696, 702 (Ind. 1999). A person acts "'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so," whereas, a person acts "'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard

involves a substantial deviation from acceptable standards of conduct." Ind. Code § 35-41-2-2.

Because the lesser offense of reckless homicide is included in the charged offense of murder, we must determine whether a serious evidentiary dispute exists as to which offense the defendant committed. See Wright, 658 N.E.2d at 567. "Presenting an alibi defense does not automatically bar instructions on a lesser included offense." Young v. State, 699 N.E.2d 252, 256 (Ind. 1998), reh'g denied. "On the other hand, it may be somewhat pertinent in making the central inquiry which remains whether there is a serious evidentiary dispute in regard to the element or elements differentiating the greater offense from the lesser." Id.

Wiggins argues that the "facts suggest more that the shooter possessed the mens rea needed for Reckless Homicide than that of Murder." Appellant's Brief at 9. Wiggins states that "the car containing the shooter did not come to a complete stop, the bullets were fired in rapid succession, there was no careful aiming of the gun, and the car immediately sped off." Id. at 9-10.

Wiggins cites Young v. State, 699 N.E.2d 252 (Ind. 1999). In Young, Korey Roney and several friends gathered in the front yard a person's home in Indianapolis. 699 N.E.2d at 254. A vehicle pulled up north of the home's driveway and stopped abruptly between two cars parked on the street such that the vehicle's passenger side faced the house. Id. Raylon Young was "hanging out the window with a gun" and yelled three times to the crowd gathered outside: "What's up now, punk m_____ f_____?" or

some variation thereof. Id. Young told the driver to "pull off," raised a handgun in his right hand and fired twice. Id. The vehicle then went north up the avenue. Id. Roney was struck in the back of the head by one of the bullets. Id.

The vehicle turned around after moving down the street a short ways and came "flyin' right back." Id. When the others realized that the car was returning they left Roney on the ground and ran indoors. Id. Young was seated on the edge of the passenger-side door with his arms extended over the car. Id. at 255. He fired about four more shots as the car passed. Id. Roney died as a result of the gunshot wound to the head. Id.

The police discovered several bullet holes and a spent bullet in the house immediately south of the house where the friends had gathered. Id. A crime scene specialist was unable to say whether the bullets were fired in random fashion or specifically aimed by the shooter. Id.

Young requested instructions on lesser included offenses, and the trial court determined that Young was not entitled to lesser included instructions but did not make a finding regarding whether a serious evidentiary dispute existed. Id. at 255-256. A jury convicted Young for the murder of Roney. Id. at 254. On appeal, Young argued that the trial court erred in refusing to instruct the jury on reckless homicide. Id.

The Indiana Supreme Court noted that the evidence about Young's state of mind at the time he fired the shot that killed Roney was both conflicting and obscure. Id. at 256. Specifically, the Court stated that witnesses testified that they knew Young from the

neighborhood, that there had been no problems, and that Young was a friend. Id. The Court observed that no witness stated that he thought Young was actually aiming his gun at any specific person. Id. The Court also observed that "[o]f the estimated six shots fired, one bullet hit [Roney] in the back of the head and was discovered on the ground near where [Roney] lay after being hit, another was discovered rather far away in a wall of the home next door." Id. A crime scene specialist was unable to say whether the recovered bullets were fired at random targets or specifically aimed. Id. The Court also stated that "possibly relevant is the fact that [Young] returned and fired four more shots though all except [Roney] were inside the home." Id. The Court concluded that "[a] jury considering these facts could well have found [Young] was acting recklessly but not knowingly when he fired the shot that killed [Roney]." Id. at 257.

Initially, we note that the trial court in Young held that Young was not entitled to lesser included instructions without making a finding regarding whether a serious evidentiary dispute existed. Id. at 255-256. Thus, the Court reviewed the trial court's decision de novo. Here, the trial court found that there was not a serious evidentiary dispute, and we review that finding for an abuse of discretion. Brown, 703 N.E.2d at 1019.

Also, unlike in Young, the evidence about Wiggins's state of mind was not conflicting and obscure. The record does not reveal any evidence that Wiggins and Jackson were friendly. Rather, the record reveals that Lakisha and Jackson were in a relationship at some point. Later, Wiggins and Lakisha were in a relationship for two

years. On the night before the shooting, Lakisha and Jackson were "hanging out" in Tiffany's home, and Wiggins knocked on the door multiple times. Transcript at 241.

Wiggins points out that "[o]ne errant bullet struck and entered a house, another struck a grill behind the house." Appellant's Brief at 10. However, Wiggins does not point to evidence in the record suggesting that the house or grill were not in the same relative location or behind Jackson when he was shot. Further, Vanison testified that he was walking with Jackson. Vanison also testified that, when Wiggins was shooting, Vanison thought that the bullets were coming right at him and that he was with Jackson when Jackson fell down.

Based upon the record, we cannot say that the trial court abused its discretion by concluding that there was no serious evidentiary dispute as to whether Wiggins knowingly, as opposed to recklessly, killed Jackson. Accordingly, the trial court did not err by refusing to instruct the jury on the lesser included offense of reckless homicide. See Miller, 720 N.E.2d at 703 (holding that the trial court did not abuse its discretion in rejecting the defendant's tendered instruction of reckless homicide where the defendant fired a total of ten shots at the victim, one of which struck the victim in the head, and that "[t]he trial court could have reasonably concluded that there was no serious evidentiary dispute as to whether Defendant knowingly killed [the victim] – that is, that firing a gun repeatedly while advancing toward the victim sitting in his car would result in a high probability of death") (footnote omitted); Sanders v. State, 704 N.E.2d 119, 122-123 (Ind. 1999) (holding that there was no serious evidentiary dispute that the defendant knowingly

shot the victim because there was no evidence he was randomly shooting and he "must have known that firing directly at a person at such close range is highly probable to result in death").

For the foregoing reasons, we affirm Wiggins's conviction for murder.

Affirmed.

CRONE, J., and MAY, J., concur.