MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Austin Frawley,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 6, 2022

Court of Appeals Cause No. 22A-CR-4

Appeal from the Madison Circuit Court

The Hon. Mark Dudley, Judge

Trial Court Cause No. 48C06-1910-MR-2553

Bradford, Chief Judge.

Case Summary

[1] Austin Frawley suspected that his girlfriend, Nicole Breese, was having an affair with his friend, Michael Beard. On October 17, 2019, Frawley and Breese got into an argument which resulted in Frawley's moving out of Breese's house and taking his gun with him. The next day, Frawley walked ten miles to Beard's house and shot him in the head while he slept, killing him. Ultimately, the State charged Frawley with murder. In November of 2021, a jury convicted Frawley of murder, and the trial court sentenced him to sixty years of incarceration. At trial, Frawley had proposed jury instructions on voluntary manslaughter, involuntary manslaughter, and reckless homicide as lesser-included offenses; however, the trial court had refused those instructions. On appeal, Frawley argues that the trial court committed reversible error when it failed to give his proposed instructions on lesser-included offenses. We affirm.

Facts and Procedural History

[2] In October of 2017, Frawley and Breese began dating. By October of 2019, their relationship had become strained with Frawley suspecting that Breese and Beard were having an affair. On October 17, 2019, Breese denied Frawley's allegations in an argument, which culminated in Frawley's moving out of Breese's house, taking his gun with him. That night, Frawley spent the night at his mother's house in Anderson, asked her "if everyone charged with murder gets life[,]" and "clean[ed] the bullets" of his gun. Tr. Vol. II p. 151, 217.

[3] The next morning, Frawley walked from Anderson to Beard's residence in Pendleton—nearly a ten-mile trip. When he arrived at Beard's home, Frawley saw that Beard's girlfriend, Chandra Kumler, was home, and he waited for her to leave. After Kumler left, Frawley waited ten minutes and then entered the home and "took matters into [his] own hands" to make sure that "no one else is going to have to be hurt by [Beard]." Ex. Vol. I p. 18, 21.

[4] Once inside, Frawley called out to Beard several times and paced around for ten minutes while Beard slept. Frawley, allegedly experiencing an anger-induced "blackout[,]" entered Beard's bedroom and shot Beard in the head. Tr. Vol. II p. 145. Afterwards, he "r[a]n out the back door" and "started walking back to Anderson." Tr. Vol. II p. 235; Ex. Vol. I p. 40. Along the way, he threw his gun into a pond. When Kumler returned home around 12:30 p.m. to find Beard in the bedroom with blood streaming from his nose, ears, and mouth, she called the police. Upon arriving, police learned that Beard and Kumler had a Google Nest video camera in their living room. Police accessed the video recording and were able to see and hear some of Frawley's actions inside the house. Later that day, police arrested Frawley.

[5] Following Frawley's arrest, the State charged him with murder and the case proceeded to a jury trial. At the conclusion of the trial, Frawley proposed jury instructions on voluntary manslaughter, involuntary manslaughter, and reckless homicide. However, the trial court declined to give each of Frawley's proffered instructions, finding that (1) there was no sudden heat to warrant an voluntary

manslaughter instruction; (2) the State did not draft the charging information in a way that allowed the trial court to give the involuntary manslaughter instruction; and (3) there was no serious evidentiary dispute regarding the reckless homicide instruction due to Frawley's "black[ing] out." Tr. Vol. II p. 219. The jury convicted Frawley of murder and the trial court sentenced him to sixty years of incarceration. Frawley now challenges the trial court's refusal to give his proposed jury instructions on voluntary and involuntary manslaughter.[1]

Discussion and Decision

[6] Instructing the jury is within the trial court's sole discretion and the court's decision is reviewed only for an abuse of that discretion. *Whetstine v. Menard, Inc.*, 161 N.E.3d 1274, 1284 (Ind. Ct. App. 2020), *trans. denied*. When reviewing a trial court's decision to refuse proffered jury instructions, "[w]e consider (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 that are given." *Forte v. State*, 759 N.E.2d 206, 209 (Ind. 2001).

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[1] In his brief, Frawley fails to argue that the trial court erred by refusing to give his proposed reckless homicide instruction. As a result, that argument is waived. Ind. App. Rule 46(A)(8)(a); *see Blanchard v. State*, 802 N.E.2d 14, 37 (Ind. Ct. App. 2004) (holding that neglecting to present an independent argument and appropriate portions of the record to establish the error results in waiver of that issue).

[7] The existence of a lesser-included offense is a question of law that we review for an abuse of discretion "[w]hen the trial court makes an express finding on the existence of an evidentiary dispute between the charged and lesser included offenses or does not make such a finding when the specific issue was not raised." *Larkin v. State*, 173 N.E.3d 662, 667 (Ind. 2021). When reviewing a trial court's decision to give a jury instruction on a lesser-included offense, we consider: (1) whether the alleged lesser-included offense is an inherently included offense to the principal charge; (2) if not, whether the lesser-included offense is a factually-included offense to the principal charge under the charging information; and (3) if the lesser-included offense is either inherently or factually included, whether there is a serious evidentiary dispute about the elements that distinguishes the lesser offense from the principal charge. *Wright v. State*, 658 N.E.2d 563, 566–67 (Ind. 1995).

[8] To begin, Frawley argues that the trial court should have given his voluntary manslaughter instruction. "Voluntary manslaughter is [an inherent] lesser included offense of murder, distinguishable by […] a defendant having killed, while acting under sudden heat." *Evans v. State*, 727 N.E.2d 1072, 1077 (Ind. 2000); *see Clark v. State*, 834 N.E.2d 153, 158 (Ind. Ct. App. 2005). "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." *Suprenant v. State*, 925 N.E.2d 1280, 1282 (Ind. Ct. App. 2010), *trans. denied*.

Neither anger nor words alone are sufficient provocation to warrant a jury instruction on voluntary manslaughter. *Id*.

[9] Frawley has failed to convince us that the trial court abused its discretion in refusing to instruct the jury on voluntary manslaughter. The record indicates that Frawley had begun suspecting that Breese and Beard were in a sexual relationship at least one week before he decided to shoot Beard. Then, after his break-up with Breese, Frawley spent the night at his mother's house and asked her "if everyone charged with murder gets life." Tr. Vol. II p. 217. That same night, Frawley "wipe[d] the fingerprints […] off the top of the bullets." Tr. Vol. II p. 246. The next day, Frawley walked ten miles to Beard's residence, waited outside his residence for Kumler to leave, and then paced inside the residence for another ten minutes before shooting Beard. Indiana courts have declined to accept a defendant's sudden-heat argument in much more immediate circumstances. *See, e.g., Evans*, 727 N.E.2d at 1077–78 (finding no sudden heat when the defendant discovered his ex-girlfriend in bed with a man, ran downstairs to grab a knife, cut the phone lines, waited outside the bedroom for one minute, and then stabbed the man to death). Here, we cannot say that the trial court abused its discretion by declining to give Frawley's voluntary manslaughter instruction.

[10] Frawley also argues that "the record creates a serious evidentiary dispute about [his] intent[,]" arguing that "[i]t is completely plausible that [he] never intended to kill the victim; that he only intended to batter the victim such as a gunshot to

the leg might do." Appellant's Br. p. 13. Involuntary manslaughter, the killing of another human being while committing a battery, is not an inherently-included offense of murder. *Collins v. State*, 966 N.E.2d 96, 104 (Ind. Ct. App. 2018); *see* Ind. Code § 35-42-2-1(c)(1). It is a factually-included offense "if the charging instrument alleges that a battery was the means of accomplishing the killing." *Collins*, 966 N.E.2d at 104. Notably, the State had not alleged that Frawley had committed battery when he shot Beard; instead, the State had alleged that "Frawley did knowingly or intentionally kill" Beard. Appellant's App. Vol. II pp. 28–29. Therefore, the State foreclosed the opportunity for a factually-included involuntary manslaughter instruction by omitting any reference to Frawley committing a battery. Moreover, the record is fraught with evidence indicating Frawley's intent to kill Beard, such as his asking his mother if everyone charged with murder receives a life sentence, and bereft of evidence indicating that he merely intended to batter him. Thus, we cannot say the trial court abused its discretion in declining to give Frawley's involuntary manslaughter instruction.

[11] The judgment of the trial court is affirmed.

Riley, J., and Pyle, J., concur.