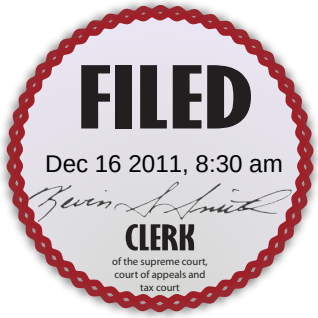

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IN THE
COURT OF APPEALS OF INDIANA

FREDERICK ALLEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-1101-CR-2
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No. 49G22-1003-MR-25754

December 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Frederick Allen appeals his conviction for murder. We affirm.

Issues

Allen raises two issues, which we restate as:

I. whether the trial court erred by denying his request for a reckless homicide instruction; and

II. whether the trial court erred by instructing the jury regarding voluntary intoxication.

Facts

Vivian Taylor and Tracie Hord were close friends. Hord was in a violent relationship with Donald Cantrell. In early 2009, Cantrell was convicted of domestic battery against Hord. While Cantrell was in prison, Hord lived with Taylor and Taylor's boyfriend, Allen. When Cantrell was released from prison in November 2009, he also moved into Taylor's residence with Taylor, Allen, and Hord. Cantrell continued to "smack" Hord, and they persisted in arguing. Tr. p. 133. In February 2010, Hord and Cantrell moved into Cantrell's mother's residence.

On March 27, 2010, Hord and Cantrell started arguing again. That evening, Hord called Taylor and asked Taylor to pick her up. Taylor agreed but said "they didn't want any bullshit." Id. at 140. Taylor picked Hord up, and they went to Taylor's house. Taylor's three-year-old grandson along with her son, Freddie Jackson, her nephew, Paris Barker, and Allen were at the house when Taylor and Hord arrived. They drank alcohol, and Hord used crack cocaine. Cantrell eventually called Hord, told her that he had placed her possessions outside, and argued with her.

At around midnight, Cantrell arrived at Taylor's house and knocked on the door. Taylor said, "Here comes trouble." Id. at 149. Allen, who was sitting on the couch, stood up but fell face first. Allen then got up and walked toward the bedroom. Barker let Cantrell into the house, and he walked over to Hord and hit her across the face. Taylor then told Cantrell to leave her house, and Cantrell argued with Taylor. Cantrell told Hord that it was time to go and that she was leaving with him. As Cantrell was walking toward the front door, Allen walked back into the living room. Allen stood in front of Hord, and Hord and Taylor saw that he had a gun. Both Hord and Taylor started screaming, and Allen shot Cantrell twice. Cantrell walked out of the house and to his car, and Hord followed him. Hord saw that Cantrell was injured and drove him to Community Hospital East. Cantrell later died.

Shortly after midnight on March 28, 2010, Indianapolis Metropolitan Police Department officers responded to a call from a neighbor regarding shots fired at Allen's residence. Taylor answered the door and told the officers that only her grandson was in the house with her. However, the officers found Allen in a bedroom, where he was sitting on the edge of the bed, staring at the floor, and rocking back and forth. Allen appeared to be "extremely intoxicated" and staggered into the living room at the officers' request. Id. at 34. In the living room, Allen became very angry, and the officers placed handcuffs on him. The officers were then informed that Allen was a suspect in the shooting of a person now at Community Hospital East, and Allen was arrested.

Officers found a spent .380 shell casing under the couch in the living room. A second shell casing was recovered from the kitchen trash can. Officers were unable to

locate the handgun. An autopsy revealed that Cantrell had two gunshot wounds. Both of the bullets entered on the left side of Cantrell's body. One of the bullets damaged Cantrell's left lung, heart, and liver, resulting in his death. That bullet entered Cantrell's body at the left "lower part of the armpit" area. Id. at 450. A graze wound on Cantrell's left arm indicated that his arm was down and "against the chest area" when the bullet entered. Id. at 451.

The State charged Allen with murder. At his jury trial, Allen argued that he acted in self-defense. Allen also proposed a reckless homicide instruction, which the trial court rejected. The State proposed a voluntary intoxication instruction, which the trial court granted. The jury found Allen guilty of murder. He now appeals.

Analysis

I. Reckless Homicide Instruction

Allen argues that the trial court erred by denying his request for an instruction on the lesser included offense of reckless homicide. In Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995), the Indiana Supreme Court clarified the circumstances under which a trial court should instruct a jury on a lesser included offense of the crime charged and set forth a three-part test. First, the trial court should determine whether the lesser offense is inherently included in the charged offense. Wright, 658 N.E.2d at 566. If the offense is not inherently included, then the trial court should determine if it is factually included in the charged offense. Id. at 567. Finally, if the offense is either inherently or factually included in the charged offense, the court should examine the evidence and determine

whether there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense. Id.

Under the third step, "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." Id. "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. "If the evidence does not so support the giving of a requested instruction on an inherently or factually included lesser offense, then a trial court should not give the requested instruction." Id.

Where a trial court makes a finding as to the existence of absence of a substantial evidentiary dispute, we review the trial court's rejection of a tendered instruction for an abuse of discretion. Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998). However, 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.

The only element distinguishing murder and reckless homicide is the defendant's state of mind. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). Reckless homicide occurs when the defendant "recklessly" kills another human being, and murder occurs when the killing is done "knowingly" or "intentionally." Id. (comparing Ind. Code § 35-

42-1-5 with I.C. § 35-42-1-1(1)). Reckless conduct is action taken in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct. I.C. § 35-41-2-2(c). By contrast, a person engages in conduct "knowingly" if the person is aware of a "high probability" that he or she is doing so. I.C. § 35-41-2-2(b). Thus, reckless homicide is an inherently included lesser offense of murder. Fisher, 810 N.E.2d at 679. The determinative issue here is whether the evidence produced a serious evidentiary dispute concerning Allen's state of mind that would justify giving the requested instruction.

During discussions about the jury instructions, Allen's counsel argued that a jury could find that, because of Allen's intoxication, his mens rea was reckless rather than knowing or intentional. The State argued that there was no serious evidentiary dispute as to whether Allen's conduct was reckless, and the trial court agreed. On appeal, Allen argues that a serious evidentiary dispute existed because Hord, Barker, and the pathologist each testified that Cantrell was facing a different direction when Allen shot him. In fact, Barker testified that Cantrell was facing Allen and that Cantrell was reaching into his pocket. Barker's testimony that Cantrell was facing Allen conflicts with the pathologist's testimony that Cantrell was shot in the left side and could not have been facing Allen. However, even if Barker's testimony is credited, there is no serious evidentiary dispute.

Our decision is guided by our supreme court's holding in Sanders v. State, 704 N.E.2d 119, 122-23 (Ind. 1999). There, evidence was presented that, as the defendant stood at the bottom of the stairs, he aimed at and shot the person descending toward him.

Our supreme court noted that there was no evidence that the defendant was shooting at the crowd on the stairs at random; rather, he shot only at the victim. The court concluded there "was no serious evidentiary dispute that Sanders knowingly shot [the victim], because Sanders must have known that firing directly at a person at such close range is highly probable to result in death." Sanders, 704 N.E.2d at 122-23. As a result, our supreme court concluded that the trial court appropriately refused Sanders's instruction on reckless homicide.

Similarly, in Pinkston v. State, 821 N.E.2d 830, 840 (Ind. Ct. App. 2004), trans. denied, the evidence demonstrated that Pinkston shot the victim, Martin, twice–once while Martin was facing him and once in the back. Immediately before firing, Pinkston remarked, "f***k this" and shot Martin while standing close to him. Pinkston, 821 N.E.2d at 840. We concluded that, "[s]uch evidence, at the very least, established that Pinkston acted 'knowingly.'" Id. Therefore, we concluded there was no serious evidentiary dispute with respect to the mens rea, and the trial court did not abuse its discretion by refusing Pinkston's tendered instruction on reckless homicide.

Here, after Cantrell arrived at Taylor's house, he hit Hord and got into an argument with Taylor. Allen, who was intoxicated, walked into the living room, aimed his gun at Cantrell, and shot Cantrell twice in the side. Although there was conflicting testimony regarding Cantrell's position when he was shot, Allen shot Cantrell twice at close range. Therefore, as in Sanders and Pinkston, there was no serious evidentiary dispute regarding the mens rea, and the trial court properly rejected Allen's reckless homicide instruction.

II. Voluntary Intoxication Instruction

Next, Allen argues that the trial court abused its discretion by giving the jury a voluntary intoxication instruction. In reviewing a trial court's decision to give or refuse a tendered jury instruction, we consider whether the instruction correctly states the law, is supported by the evidence in the record, and is covered in substance by other instructions. Whitney v. State, 750 N.E.2d 342, 344 (Ind. 2001). The trial court has discretion in instructing the jury, and we will reverse only when the instructions amount to an abuse of discretion. Id. "Jury instructions are to be considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case." Id.

Over Allen's objection, the trial court instructed the jury that: "Voluntary intoxication is not a defense to a charge of murder. You may not take voluntary intoxication into consideration in determining whether the defendant acted knowingly as alleged in the information." Appellant's App. p. 233. The basis of this instruction is Indiana Code Section 35-41-2-5, which provides: "Intoxication is not a defense in a prosecution for an offense and may not be taken into consideration in determining the existence of a mental state that is an element of the offense unless the defendant meets the requirements of IC 35-41-3-5." Indiana Code Section 35-41-3-5 provides: "It is a defense that the person who engaged in the prohibited conduct did so while he was intoxicated, only if the intoxication resulted from the introduction of a substance into his body: (1) without his consent; or (2) when he did not know that the substance might cause intoxication."

Allen makes no argument that the instruction incorrectly states the law or is covered in substance by other instructions. Thus, his complaint seems to be that the instruction was not supported by the evidence in the record. The evidence was undisputed that Allen was intoxicated during the incident. Allen had been drinking with friends all evening, he fell down shortly before the shooting, and he was extremely intoxicated when the officers arrived at Taylor's residence immediately after the shooting. Despite this evidence, Allen argues that the instruction was unnecessary and prejudicial because he was not claiming intoxication as a defense. Allen contends that evidence of his intoxication was admitted and embraced by the State and relieved the State of its duty to prove each element of murder and disprove an element of self-defense. However, while the trial court and counsel were discussing jury instructions, Allen argued at trial that his intoxication "might go to the mens rea element . . . ." Tr. p. 889.

Given the evidence of Allen's intoxication and the fact that Allen raised the issue of intoxication as a defense to the mens rea element during discussions of jury instructions, we conclude that the instruction was supported by the evidence. See, e.g., Baer v. State, 942 N.E.2d 80, 97 (Ind. 2011) (holding that an instruction that voluntary intoxication was not a defense and "could not be taken into account when determining mental state required for conviction . . . was a correct statement of the law and was relevant in determining whether Baer committed his crimes intentionally").

Conclusion

We conclude that the trial court properly instructed the jury. We affirm.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.