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**IN THE
COURT OF APPEALS OF INDIANA**

CECIL BLACK, JR.,)

Appellant-Defendant,)

vs.)

No. 71A03-0705-CR-196

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D01-0309-MR-22

October 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Cecil Black, Jr., appeals his conviction for Murder,¹ a felony. Black argues that the trial court erroneously refused to give his proffered jury instruction on involuntary manslaughter. Finding that the evidence did not support such an instruction, we affirm the judgment of the trial court.

FACTS

On September 24, 2003, Black and his friend, Eddy Kawira, had spent the day at Black's home drinking alcohol and using illegal substances. In the late afternoon, John Luke came to Black's residence to buy drugs from Black. Luke purchased the drugs using money that he had stolen from Black's father. After Black learned of the theft, he became outraged. He walked to Luke's house, where Luke's girlfriend delayed Black while Luke escaped from the back of the residence.

Black walked back to his own residence, still angry, and vowed that he would "f*ck [Luke] up." Tr. p. 274. Shortly thereafter, Luke's girlfriend arrived at Black's house to discuss the situation, but Black shoved her off of his porch and said that she and Luke were acting together to "screw" him out of his money. Id. at 278.

After the confrontation with Luke's girlfriend, Black and Kawira drove away from Black's residence to purchase more beer. While they were out, Black purchased a handgun and, on the drive back to Black's house, he fired the gun into the air several times.

Early on the morning of September 25, 2003, Frank Pangallo and Renee Milligan drove to Black's residence so that Renee could repay Black some money that she owed to

¹ Ind. Code § 35-42-1-1.

him. Black showed Pangallo the handgun that he had purchased, and Pangallo showed Black how to operate the “somewhat broken” weapon. Appellee’s Br. p. 3. Black mentioned that Luke had stolen money from him and Pangallo and Milligan observed that Black was still upset about it.

As Pangallo and Milligan left Black’s house and walked to their vehicle, Pangallo noticed someone, later identified as Luke, walking down the street towards them. Before Pangallo entered the vehicle, he turned around and saw Black pointing the handgun at Luke, who was holding a knife in his hand. Pangallo heard the men arguing and, while Pangallo was turned in the other direction, he heard a gunshot. When he turned around, he saw Luke on the ground. Black fired his gun at Luke, who was attempting to flee, two more times and then fled. Pangallo and Renee drove away to a pay phone and called 911.

South Bend Police officers arrived on the scene within minutes and found Luke on the street. Luke had been shot three times, and one of the wounds proved fatal. He had also suffered contusions and bruises on his left cheek. The forensic pathologist who conducted Black’s autopsy testified that the bullets causing Luke’s injuries had been fired from a gun that was at least three feet away at the time of the shooting.

Five days after the shooting, Black surrendered to the police, having cut his hair, thrown away the clothing he was wearing at the time of the incident, and disposed of the handgun. Black provided different versions of the shooting to the police, at first contending that he and Luke had fought and the gun had fired accidentally and denying that he had purchased the handgun only hours before the shooting. Black then changed his story,

admitting that he had purchased the gun that night and claiming that he had fired the weapon in self-defense, notwithstanding an earlier claim that he did not know that Luke had been carrying a knife at the time of the shooting.

On September 26, 2003, the State charged Black with murder. A jury found Black guilty as charged on September 10, 2004. Black appealed his conviction and this court reversed, finding that he had not received a fair trial because the trial court had prohibited him from questioning prospective jurors regarding self-defense during voir dire. Black v. State, 829 N.E.2d 607, 612 (Ind. Ct. App. 2005).

Black's second jury trial commenced on February 27, 2007. He proffered jury instructions on self-defense, voluntary manslaughter, and involuntary manslaughter. The trial court instructed the jury on self-defense and voluntary manslaughter but refused to give the involuntary manslaughter instruction because there was no evidence to support it. The jury found Black guilty as charged, and on March 28, 2007, the trial court sentenced Black to fifty-five years imprisonment. Black now appeals.

DISCUSSION AND DECISION

Black argues that the trial court erroneously refused to give his proffered jury instruction on involuntary manslaughter. The trial court has broad discretion in the manner of instructing the jury and we review its decision thereon only for an abuse of that discretion. Snell v. State, 866 N.E.2d 392, 395 (Ind. Ct. App. 2007). We review the refusal of a tendered instruction by examining whether (1) the tendered instruction correctly states the law, (2) there is evidence in the record to support giving the instruction, and (3) the substance

of the tendered instruction is covered by other given instructions. Id. at 395-96. We will not reverse the trial court’s ruling unless the instructions, when taken as a whole, misstate the law or mislead the jury. Id. at 396.

The purpose of an instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. Id. Each party to an action is entitled to have the jury instructed on his particular theory of complaint or defense. Id. Generally, “a defendant in a criminal case is entitled to have the jury instructed on any theory of defense which has some foundation in the evidence.” Howard v. State, 755 N.E.2d 242, 247 (Ind. Ct. App. 2001). This is so even if the evidence supporting the defense is weak and inconsistent; however, there must be some probative evidence supporting the defense to warrant an instruction. Snell, 866 N.E.2d at 396.

The element distinguishing involuntary manslaughter from murder is the defendant’s intent—to kill or merely to commit battery. See I.C. § 35-42-1-1(1) (providing that murder occurs when a person knowingly or intentionally kills another human being); I.C. § 35-42-1-4(c)(3) (providing that involuntary manslaughter occurs when, among other things, a person kills another human being while committing or attempting to commit a battery); Simpson v. State, 628 N.E.2d 1215, 1221 (Ind. Ct. App. 1994) (observing that involuntary manslaughter contemplates an incidental killing that occurs during a battery). Where, as here, involuntary manslaughter is a factually-included lesser offense of murder, in deciding whether to instruct the jury on involuntary manslaughter, the trial court must consider whether a serious

evidentiary dispute exists whereby the jury could have concluded that the lesser offense was committed but not the greater. Clark v. State, 834 N.E.2d 153, 156 (Ind. Ct. App. 2005); see also Ketcham v. State, 780 N.E.2d 1171, 1177 (Ind. Ct. App. 2003) (holding that involuntary manslaughter is a factually-included lesser offense of murder if the charging information alleges that the killing occurred by a battery). Merely because the defendant states after the fact that he did not intend to kill the victim does not automatically present a serious evidentiary dispute. Ketcham, 780 N.E.2d at 1178.

Here, Black claimed, in part, that the shooting was an accident. Such a defense necessarily negates any lesser-included offense instruction on involuntary manslaughter because it is a defense that the defendant had no intent whatsoever to kill or batter the decedent. See McEwen v. State, 695 N.E.2d 79, 87 (Ind. 1998) (holding that accident defense foreclosed any middle ground on intent and rendered an involuntary manslaughter instruction improper).

Moreover, the record reveals that Black spent much of the day angry with Luke for stealing money from Black's father and using that money to buy drugs from Black. Tr. p. 267-68, 278, 400, 507-10. Black stated that he planned to "f*ck [Luke] up." Id. at 274. In the midst of his anger with Luke, Black purchased a handgun. Id. at 282-89. Pangallo and Milligan testified that during the confrontation between Black and Luke, Black chased Luke around Pangallo's truck and fired the handgun at Luke multiple times as Luke was attempting to flee the scene. Id. at 187-90, 197-202, 236-39, 241-42. Subsequently, Black fled the scene and gave multiple versions of the incident to police officers.

Based on this record, we find that there is no serious evidentiary dispute whereby the jury could have concluded that Black committed involuntary manslaughter but not murder, inasmuch as the evidence does not support a conclusion that Black intended to batter, but not kill, Luke. See Ketcham, 780 N.E.2d at 1178 (finding that defendant's intent to kill was established where the defendant fired several shots at a victim who was attempting to escape, subsequently fleeing the scene); Erlewein v. State, 775 N.E.2d 712, 715 (Ind. Ct. App. 2002) (holding that the defendant's failure to aid the victim and later deceptive statements to police were indicative of an intent to kill); Mauricio v. State, 683 N.E.2d 1329, 1332 (Ind. Ct. App. 1997) (observing that intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or serious bodily injury). Consequently, the trial court did not abuse its discretion in refusing to give Black's proffered jury instruction on involuntary manslaughter.

The judgment of the trial court is affirmed.

BAILEY, J., and VAIDIK, J., concur.