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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD A. BISHOP,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 89A01-0511-CR-529

APPEAL FROM THE WAYNE SUPERIOR COURT
The Honorable P. Thomas Snow, Judge
Cause No. 89D01-0403-MR-1

November 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Richard A. Bishop appeals his convictions for the attempted murder of his ex-girlfriend, the murder of his unborn son, and burglary raising four issues. First, we conclude that the trial court's admission of prior bad acts is harmless error in light of the substantial evidence of Bishop's guilt. Also, although the prosecutor improperly questioned Bishop about his religious beliefs during his cross-examination at trial, Bishop has failed to establish fundamental error on this point. Next, the trial court did not err in refusing to give Bishop's tendered instruction on battery as a Class C felony as a lesser-included offense of attempted murder because there is no serious evidentiary dispute that Bishop intended to kill his girlfriend when he stabbed her twenty-seven times with a knife. Finally, Bishop's convictions for murder and attempted murder do not violate the Indiana Double Jeopardy Clause's actual evidence test because there are separate victims. We therefore affirm Bishop's convictions.

Facts and Procedural History

Tiffany Watkins ("Tiffany"), who was nineteen years old and had recently returned to work after having a baby, met Bishop in February 2003 while they were both working at the Long John Silver's in Richmond, Indiana, and the pair started dating. In November 2003, Bishop ended the relationship with Tiffany. Shortly thereafter, Tiffany learned that she was pregnant with Bishop's child. She told Bishop, who was happy about the pregnancy. Tiffany, however, was nervous because she was nineteen years old and already had a baby, so she was contemplating having an abortion. Tiffany ultimately

decided not to have an abortion. It appears that Tiffany did not communicate this decision to Bishop.

Although Bishop wanted to reconcile with Tiffany, Bishop and Tiffany were merely friends and remained that way until Valentine's Day 2004. On that day, Bishop came to Tiffany's house, and they began arguing. When Tiffany told Bishop to leave and tried pushing him out the door, he forced his way back into the house and held Tiffany down on the couch. After Tiffany managed to free herself and force Bishop outside, he started punching the door, breaking the glass, and yelled, "You fuc**** bit**. If you kill my baby, I'm going to fuc**** kill your baby." Tr. p. 364. Even though Bishop was no longer welcome at Tiffany's house, he would drive by her house, knock on the door sometimes, and even left a note asking if she was still pregnant.

In the early morning hours on March 31, 2004, Tiffany was awakened to Bishop standing over her in her bed. Bishop, who testified at trial that he assumed Tiffany had an abortion, asked Tiffany about the baby, and Tiffany responded that he was not worried about the baby on Valentine's Day when he attacked her, so why was he worried about the baby now. Bishop then called Tiffany a "bit**" and came "flying" at her. *Id.* at 385. Tiffany thought that Bishop was punching her, so she fought back; however, Tiffany soon realized that she was bleeding and that Bishop was stabbing her with a knife. As Tiffany ran downstairs, Bishop stabbed her again in the back. Tiffany pled with Bishop to stop stabbing her, and he did. Tiffany then fell face down on the kitchen floor, and Bishop called 911. When the police arrived, Bishop, covered in Tiffany's blood, told

them that Tiffany was in the kitchen, that “[he] did it,” and that the knife was in his pocket. *Id.* at 167.

In all, Bishop stabbed Tiffany twenty-seven times. Of the twenty-seven stab wounds, two were critical. The first critical wound was to Tiffany’s chest, which had penetrated her lung, causing it to collapse. The second critical wound was a large laceration to Tiffany’s left arm, which had severed an artery. Tiffany had severe blood loss from all of the stab wounds, losing approximately two-thirds of her blood volume. After Tiffany was resuscitated in the emergency room, an obstetrician was summoned, but he was unable to detect a fetal heartbeat. The fetus, which was approximately twenty-seven to twenty-nine weeks gestation and which Tiffany later named Jake, died as a result of Tiffany’s substantial loss of blood, which had caused a loss of oxygen to the fetus. The pediatric pathologist who performed the autopsy on Jake and the obstetrician who saw Tiffany in the emergency room agreed that he was viable¹ at the time of death. Tiffany then underwent an eight-hour surgery. Tiffany’s surgeon testified that she would have died but for immediate medical intervention. To this day, Tiffany has partially lost the use of her left arm and hand and has extensive scars from the attack.

The State charged Bishop with murder, a felony, for killing a fetus that had attained viability;² attempted murder, a Class A felony, for stabbing Tiffany;³ and

¹ Viability is defined as “the ability of a fetus to live outside the mother’s womb.” Ind. Code § 16-18-2-365.

² Ind. Code § 35-42-1-1(4).

³ Ind. Code §§ 35-41-5-1, 35-42-1-1(1).

burglary as a Class A felony for breaking and entering Tiffany's house with the intent to commit a felony therein resulting in serious bodily injury to Tiffany.⁴ The State also filed a notice of its intent to seek a sentence of life imprisonment without parole.

A jury trial was then held. During the guilt phase of the trial, the trial court refused to give Bishop's tendered instruction on battery as a Class C felony as a lesser-included offense of attempted murder. Following this phase of the trial, the jury found Bishop guilty but mentally ill of murder, attempted murder, and burglary. The penalty phase of the trial was then held. Following this phase of the trial, the jury declined to impose a sentence of life imprisonment without parole and recommended a term of years instead. Thereafter, the trial court sentenced Bishop to an aggregate term of 101 years.⁵ Bishop now appeals.

Discussion and Decision

Bishop raises four issues on appeal. First, he contends that the trial court erred in admitting evidence of the Valentine's Day altercation and items he took from Tiffany's house because it is impermissible character evidence in violation of Indiana Evidence Rules 403 and 404(b). Second, he challenges the prosecutor's exploration of his religious beliefs during his cross-examination at trial. Third, he contends that the trial court erred by refusing to give his tendered instruction on battery as a Class C felony as a lesser-included offense of attempted murder. Finally, he contends that his convictions for

⁴ Ind. Code § 35-43-2-1(2)(B).

⁵ Although the jury found Bishop guilty of burglary as a Class A felony, the trial court sentenced Bishop to burglary as a Class B felony because of double jeopardy concerns.

murder and attempted murder violate the Indiana Double Jeopardy Clause's actual evidence test. We address each issue in turn.

I. Admission of Evidence

First, Bishop contends that the trial court erred in admitting evidence of the Valentine's Day altercation and items he took from Tiffany's house⁶ because it is impermissible character evidence in violation of Indiana Evidence Rules 403 and 404(b). Evidence Rule 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, and Evidence Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. Evidence admitted in violation of Evidence Rules 403 and 404(b) will not require a conviction to be reversed "if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect a party's substantial rights." *Houser v. State*, 823 N.E.2d 693, 698 (Ind. 2005) (quotation omitted).

Here, even if the trial court erred in admitting evidence of the Valentine's Day altercation and items Bishop took from Tiffany's house, when that evidence is viewed in light of the evidence pointing to Bishop's guilt in this case, it is relegated to the status of harmless error. *See id.* That is, Bishop called 911, admitted to the police that he had stabbed Tiffany with a knife, was covered in blood at the scene of the crime, and had a

⁶ A police officer testified at trial that several of Tiffany's belongings were found in Bishop's car, including a notebook, memory cards, photographs, a jewelry box, and a manicure set.

bloody knife in his pocket. We conclude that the probable impact of the evidence was sufficiently minor so as not to affect Bishop's substantial rights. *See id.*

II. Exploration of Bishop's Religious Beliefs

Next, Bishop challenges the prosecutor's exploration of his religious beliefs during his cross-examination at trial. The following exchange occurred during trial:

- Q: Are you a religious man, Mr. Bishop?
- A: I don't see how religion has anything to do with this.
- Q: Well, maybe it will and maybe it won't. Are you a religious man?
- A: I'm not going to answer that because I feel like religion like can tend to sway peoples' belie . . . like someone's belief shouldn't be . . . like sometimes people hold beliefs, can discriminate
- Q: . . . O.K. I'm not asking you
- A: . . . can discriminate against beliefs
- Q: . . . that's fine. I'm not asking your denomination, what religion you are, or anything like that, but didn't you tell Pamela Waters you're a Christian?
- A: Yes.
- Q: And, as part of being a Christian, does it mandate or call for people to seek forgiveness of peoples' sins?
- A: Yes.
- Q: And, do you believe that all sins can be forgiven, no matter how horrible?
- A: Yes.
- Q: Do you believe that God will forgive you for this sin?
- A: Yes.
- Q: And, have you asked God for that forgiveness?
- A: Yes.
- Q: And, acknowledged the terrible act that you've done to Tiffany Watkins?
- A: Yes.
- Q: And, as a part of seeking forgiveness, acknowledging what you have done before God and everybody?
- A: Yes.
- Q: Then, tell this jury that you are responsible for what happened to Tiffany and you're responsible for killing your son.
- A: Yes, I'd say I'm responsible for the stab wounds to her and I'm responsible for my son's death.

Appellant's App. p. 121-22. Bishop makes three challenges based on this exchange. First, he argues that the trial court erred in admitting the above-quoted passage because his religious beliefs are irrelevant. Second, he argues that the injection of his religious beliefs into his trial violates his right to freedom of religious belief under the United States and Indiana Constitutions. Third, he argues that the prosecutor committed prosecutorial misconduct by delving into his religious beliefs. We address each argument in turn.

A. Relevance

First, Bishop argues that the trial court erred in admitting the above-quoted passage because his religious beliefs are irrelevant. Bishop concedes that his attorney did not object to this line of questioning at trial, and therefore, this issue is waived for review unless it amounts to fundamental error. The fundamental error exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006).

Although neither party cites it, Indiana Evidence Rule 610 provides, "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of their nature, the witness's credibility is impaired or enhanced." Although it is not readily apparent what the State was trying to accomplish by inquiring into Bishop's religious beliefs, what is apparent is that this line of questioning was entirely irrelevant to any of the issues at Bishop's trial, *see* Ind. Evidence Rule 401 ("'Relevant evidence' means evidence having any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”), and therefore is inadmissible, *see* Ind. Evidence Rule 402 (“Evidence which is not relevant is not admissible.”).

However, the State argues that even if the exploration of Bishop’s religious beliefs was irrelevant, it was nevertheless beneficial to Bishop because it “cast [him] in a positive light, as it demonstrated remorse and acceptance of responsibility for his crimes.” Appellee’s Br. p. 7. Therefore, the State’s argument continues, the admission of such evidence cannot amount to fundamental error. Given the overwhelming evidence of Bishop’s guilt, the trial court’s admission of the evidence pertaining to Bishop’s religious beliefs—wherein Bishop testified that he has sought forgiveness for his actions—does not amount to fundamental error.

B. Violation of Right to Freedom of Religious Belief

Second, Bishop argues that the injection of his religious beliefs into his trial violates his right to freedom of religious belief under the United States and Indiana Constitutions. Other than citing the First Amendment to the United States Constitution and Article I, Section 3 of the Indiana Constitution, Bishop does not present much analysis on this issue other than to argue:

For the State to ask a criminal defendant about his religious beliefs before the jury, imposes a burden on the defendant’s free exercise of religion as it invites the jury to judge the defendant, not only based on the properly admitted evidence regarding the crime charged, but further on the defendant’s choice of religious beliefs and practices. Such a practice burdens religious belief in that those who maintain private religious beliefs that are different tha[n] the majority of their peers may fear that, in the

event they were to ever be charged with a crime, they may come under sanction from their neighbors, not based on the criminal conduct charged, but because of their divergent religious beliefs and practices.

Appellant's Br. p. 20-21. Here, although Bishop's religious beliefs were irrelevant to any of the issues at his trial, Bishop, in essence, testified that he was a Christian, that he had sought forgiveness, that he believed God would forgive him, and that he accepted responsibility for his actions. Given this testimony, Bishop has failed to show how it has impacted his constitutional rights. We find no error on this issue.

C. Prosecutorial Misconduct

Third, Bishop argues that the prosecutor committed prosecutorial misconduct by delving into his religious beliefs. As with his relevancy argument, Bishop concedes that his attorney did not object to the prosecutor's line of questioning at trial, and therefore, this issue is waived for review unless it amounts to fundamental error. In reviewing a properly-preserved claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct; and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected. *Booher v. State*, 773 N.E.2d 814, 817 (Ind. 2002). "The gravity of peril is measured by the probable persuasive effect of the misconduct on the jury's decision rather than the degree of impropriety of the conduct." *Id.* An appellate claim of prosecutorial misconduct in the absence of a contemporaneous trial objection will not succeed unless the defendant establishes not only the grounds for prosecutorial misconduct but also the additional grounds for fundamental error. *Id.* at 818. For prosecutorial misconduct to constitute fundamental error, it must "make a fair trial

impossible or constitute clearly blatant violations of basic and elementary principles of due process [and] present an undeniable and substantial potential for harm.” *Id.* at 817 (quotation omitted).

Although the prosecutor asked Bishop questions that were not only irrelevant but also emotionally charged, we cannot say that the prosecutor’s actions placed Bishop in a position of grave peril. The evidence against Bishop is substantial. The evidence that Bishop called 911, admitted to the police that he had stabbed Tiffany with a knife, was covered in blood at the scene of the crime, and had a bloody knife in his pocket outweighs the effect the prosecutor’s questions and Bishop’s responses could have had on the jury. Bishop has failed to establish fundamental error on this issue.

III. Lesser-Included Offense Instruction

Next, Bishop contends that the trial court erred by refusing to give his tendered instruction on battery as a Class C felony as a lesser-included offense of attempted murder. In *Wright v. State*, 658 N.E.2d 563 (Ind. 1995), the Indiana Supreme Court developed a three-part test that trial courts should use when called upon by a party to instruct a jury on a lesser-included offense of the crime charged. First, the trial court must compare the statute defining the crime charged with the statute defining the alleged lesser-included offense to determine whether the alleged lesser-included offense is inherently included in the crime charged. *Fisher v. State*, 810 N.E.2d 674, 678 (Ind. 2004). Second, if the trial court determines that an alleged lesser-included offense is not inherently included in the crime charged under step one, then the court must determine whether the alleged lesser-included offense is factually included in the crime charged. *Id.*

If the alleged lesser-included offense is neither inherently nor factually included in the crime charged, then the trial court should not give an instruction on the alleged lesser-included offense. *Id.* Third, if the trial court determines that an alleged lesser-included offense is either inherently or factually included in the crime charged, then the court must look at the evidence presented in the case by both parties to determine whether 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. *Id.* It is reversible error for a trial court not to give an instruction, when requested, on an inherently or factually included offense if there is such an evidentiary dispute. *Id.* Our standard of review is abuse of discretion when the trial court has made a finding on the existence or lack of a serious evidentiary dispute. *Shouse v. State*, 849 N.E.2d 650, 657 (Ind. Ct. App. 2006), *trans. denied*.

Battery as a Class C felony is not an inherently included offense of attempted murder. *Tracy v. State*, 837 N.E.2d 524, 528 (Ind. Ct. App. 2005) (citing *Edwards v. State*, 773 N.E.2d 360, 364 (Ind. Ct. App. 2002), *trans. denied*), *clarified on other grounds on reh'g*, 840 N.E.2d 360 (Ind. Ct. App. 2006), *trans. denied*. Determining whether battery is a factually included offense of attempted murder “involves comparing the statute defining the alleged lesser [-]included offense with the charging information in the case.” *Id.* (citing *Noble v. State*, 725 N.E.2d 842, 846 (Ind. 2000); *Means v. State*, 807 N.E.2d 776, 783-84 (Ind. Ct. App. 2004), *trans. denied*); *see also Edwards*, 773 N.E.2d at 364-65 (comparing charging information for attempted murder with elements of alleged lesser-included offense of battery as a Class C felony).

Battery as a Class C felony is defined by statute as a knowing or intentional touching of another person in a rude, insolent, or angry manner if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon. Ind. Code § 35-42-2-1(a)(3). The charging information for attempted murder in this case alleged that Bishop “knowingly or intentionally engage[d] in conduct which constituted a substantial step towards the commission of the criminal offense of Murder, to-wit: . . . Bishop did stab or cut repeatedly with a knife[] the body of Tiffany Watkins.” Appellant’s App. p. 8. A comparison of the elements of battery with the charging information for attempted murder in this case reveals that battery is factually included in the offense of attempted murder. *See Edwards*, 773 N.E.2d at 365. Nevertheless, the trial court concluded that there was not a serious evidentiary dispute regarding the distinction between the two crimes, namely, intent to kill. We agree with the trial court. Bishop stabbed Tiffany twenty-seven times, puncturing her lung and severing an artery in her arm, among other injuries. Given such clear evidence of intent to kill, the trial court properly refused to instruct the jury on battery as a Class C felony as a lesser-included offense of attempted murder.

IV. Double Jeopardy

Last, Bishop contends that his convictions for murder and attempted murder violate the Indiana Double Jeopardy Clause, specifically, the *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), actual evidence test. In particular, Bishop “question[s] whether an attack on the mother that causes the death of the fetus can result in t[w]o separate and dist[inct] punishments.” Appellant’s Br. p. 25.

“[U]nder the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.” *Bald v. State*, 766 N.E.2d 1170, 1172 (Ind. 2002) (quoting *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002)). Although Bishop’s murder and attempted murder convictions resulted from one act of stabbing, two people were injured as a result of the stabbing. *See Whaley v. State*, 843 N.E.2d 1, 15 (Ind. Ct. App. 2006), *trans. denied*. Thus, each conviction required proof of at least one unique evidentiary fact, *i.e.*, death to the fetus or injuries to Tiffany. *See id.* Because there are two victims, Bishop’s convictions do not violate the *Richardson/Spivey* actual evidence test. *See Bald*, 766 N.E.2d at 1172; *Whaley*, 843 N.E.2d at 15.

Affirmed.

BAKER, J., and CRONE, J., concur.