

Appellant-defendant Guadalupe Torres appeals his convictions for Murder,¹ a felony, and Assisting a Criminal,² a class C felony, claiming that the trial court erred in refusing to give his proffered instruction on Conspiracy to Commit Aggravated Battery,³ a class B felony. Specifically, Torres contends that his instruction should have been given because “the facts presented at trial made aggravated battery an inherently included offense of murder and there was a serious evidentiary dispute concerning the elements of murder and aggravated battery.” Appellant’s Br. p. 9. Concluding that the trial court did not err in refusing to give Torres’s tendered instruction, we affirm.

FACTS

Heather Hutchison and Jimmy Dydo dated for approximately seven years. After their relationship ended in April 2009, Dydo continued contacting Hutchison multiple times each week and frequently stopped by her residence.

Hutchison and Guy Torres—Torres’s cousin—worked together and became friends. On one occasion when Guy was visiting Heather, Dydo threatened to “kick [Guy’s] a**” if Torres did not leave. Tr. p. 238, 258-59.

Approximately a week later, Dydo went to Hutchison’s workplace and asked what her plans were. When Hutchison told Dydo that she was going to study after work, Dydo became upset and accused her of lying. Hutchison called for help, and a few minutes

¹ Ind. Code § 35-42-1-1.

² Ind. Code § 35-44-3-2.

³ I.C. 35-42-2-1.5; Ind. Code § 35-41-5-2.

later, Torres and Ponie Clark entered the store and approached Guy. At some point, Ponie flashed a gun tucked inside his pants and said that he “felt like killing someone tonight.” Id. at 264, 297.

On September 9, 2009, Dydo went to Hutchison’s residence at approximately 9:00 p.m. Guy had been texting Hutchison and made plans to see her that evening. Although Hutchison told Guy not to come over, he told her that he would arrive in about twenty minutes. Guy then contacted Torres and asked him to go to Hutchison’s house with him.

Guy and Torres picked up Ponie and drove to Guy’s house. At that time, Ponie “rounded” the gun and said, “this ends tonight.” Id. at 302. Ponie then stated that they needed to pick up his girlfriend, Charlotte. Guy followed Torres, who was driving an SUV. After the group picked up Ponie’s girlfriend, Guy drove to Hutchison’s house, while the others followed in the SUV. When Torres arrived at Hutchison’s residence, he called Guy and told him to “circle the block . . . to look for cops.” Id. at 305.

Thereafter, Guy texted Hutchison that he had arrived. Hutchison noticed the roof of Dydo’s vehicle and watched as he turned around in the middle of the street and pulled in behind Guy’s car. Ponie started shooting at Dydo and chased him down the street. Dydo eventually collapsed, and when Ponie caught up with him, he shot Dydo in the head. Ponie ran to a dark blue SUV that was waiting for him. Dydo died as a result of his gunshot wounds.

At approximately 9:30 p.m., Torres called Carter, his friend and co-worker, and told him that he was going to “stop by.” Id. at 169. Shortly thereafter, Torres, Ponie, and

Charlotte arrived in a dark blue SUV. At some point, Torres and Ponie asked Carter to keep a gun for them until they returned to work on Tuesday.

Guy spoke with police officers and initially told them that he did not know who had shot Dydo. However, at the conclusion of the interview, Guy told the officers about the incident and where to locate Torres and Ponie. Just after 1:00 a.m., St. Joseph County Police Officer Anthony Jozaites went to Torres's house after Torres reported that his SUV had been stolen. In fact, it was subsequently determined that Ponie drove the SUV to Michigan and parked it on a street.

On September 9, 2009, Torres was charged with murder and assisting a criminal. The charging informations alleged that Torres "did knowingly kill . . . Dydo, by shooting him, causing him to die." Appellant's App. p. 6. Count two alleged that "Torres . . . did assist . . . persons who have committed a crime, to wit: murdering James Dydo and drove Ponie Clark away for the shooting, intending thereby to hinder the apprehension and punishment of Ponie Clark . . . [and others]." Id.

At some point, Guy pleaded guilty to conspiracy to commit aggravated battery and testified against Torres. Ponie was convicted of Dydo's murder in a separate trial. During Torres's jury trial that commenced on June 7, 2010, his counsel requested a jury instruction on the offense of conspiracy to commit aggravated battery. The trial court rejected the instruction, observing that conspiracy to commit aggravated battery was not an inherently lesser included offense of murder because a conspiracy requires an

agreement, whereas one can commit a crime by aiding another to do so without an agreement.

Torres was found guilty as charged and the trial court subsequently sentenced him to forty-five years for murder and to eight years for assisting a criminal. The sentences were ordered to run concurrently with each other and Torres now appeals.

DISCUSSION AND DECISION

As set forth above, Torres argues that his convictions must be reversed because the trial court should have given his proffered instruction on the offense of conspiracy to commit aggravated battery. Torres argues that the instruction should have been given because the evidence demonstrated that aggravated battery was an inherently included offense of murder.

As we have previously determined:

The purpose of a jury 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. Dill v. State, 741 N.E.2d 1230, 1232 (Ind. 2001) (quoting Chandler v. State, 581 N.E.2d 1233, 1236 (Ind. 1991)). Instruction of the jury is left to the sound judgment of the trial court and will not be disturbed absent an abuse of discretion. Schmidt v. State, 816 N.E.2d 925, 930 (Ind. Ct. App. 2004), trans. denied. Jury instructions are not to be considered in isolation, but as a whole and in reference to each other. Id. The instructions must be a complete, accurate statement of the law which will not confuse or mislead the jury. Id. at 930-31. Still, errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. Id. at 933 (citing Dill, 741 N.E.2d at 1233).

Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008). Further:

In reviewing a challenge to a jury instruction, we consider: (1) whether the instruction is a correct statement of the law; (2) whether there was evidence in the record to support giving the instruction; and (3) whether the substance of the instruction is covered by other instructions given by the court.

Simpson v. State, 915 N.E.2d 511, 519 (Ind. Ct. App. 2009) (quotation omitted), trans. denied.

In considering whether an instruction on a lesser-included offense should be given, the trial court must address whether: (1) the lesser offense is inherently included in the charged offense; (2) if not inherently included, then the court must examine the facts to determine whether the alleged offense is factually included; and (3) if either inherently or factually included, the trial court must then determine if there is a serious evidentiary dispute about the elements distinguishing the offenses, and, if such a dispute exists, give the instruction, when requested. Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995).

An offense is inherently included if the lesser can be established by proof of the same material elements or less than the same material elements, or that a lesser culpability is required. Id. If the trial court determines that the alleged lesser-included offense is not inherently included in the charged crime, it must compare the statute defining the alleged lesser-included offense with the charging instrument in the case. If all of the elements of the alleged lesser-included offense are covered by the allegations in the charging instrument, then the alleged lesser-included offense is factually included in the charged crime. Kilgore v. State, 922 N.E.2d 114, 119 (Ind. Ct. App. 2010), trans. denied.

In this case, Torres offered the following instruction:

The Defendant is charged with Murder. If you find the Defendant not guilty of that charge, then you should consider whether he is guilty of the lesser included offense of Conspiracy to Commit Aggravated Battery, a Class B Felony, I.C. 35-42-2-1.5, I.C. 35-41-5-2.

Aggravated Battery, a Class B Felony, is defined as: A person who knowingly or intentionally inflicts injury on a person that creates a substantial risk of death.

In a minute I will instruct you on the elements which the State is required to prove beyond a reasonable doubt before you may find the Defendant guilty of a lesser included offense.

Appellant's App. p. 191.

In accordance with Indiana Code section 35-42-1-1(1), murder is defined as the knowing or intentional killing of another human being. And conspiracy requires proof of an agreement to commit a felony. I.C. § 35-41-5-2. As for accomplice liability, Indiana Code section 35-41-2-4 provides that "A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense." An accomplice is criminally responsible for all acts committed by a confederate that are a probable and natural consequence of their concerted action. McGee v. State, 699 N.E.2d 264, 265 (Ind. 1998). Moreover, an accomplice need not participate in each and every element of the charged offense before he or she can be convicted of it.

When examining these statutes, it is apparent that conspiracy cannot be proven by the same or less material elements of murder. Thus, because the State is required to prove the additional element of an agreement in a conspiracy charge, conspiracy to

commit aggravated battery is not an inherently included lesser offense of murder. Wright, 658 N.E.2d at 566-67. Moreover, because the charging information in this case did not include all of the elements required to prove the offense of conspiracy, conspiracy to commit aggravated battery is not a factually included offense of murder.

Finally, we note that a trial court can reject an incomplete and potentially confusing instruction. Richardson v. State, 697 N.E.2d 462, 466 (Ind. 1998). Although Torres's proposed instruction included a citation to the conspiracy statute, it did not define conspiracy. As a result, the instruction was incomplete and potentially confusing to the jury. For all these reasons, we conclude that the trial court properly refused to give Torres's proposed instruction.

The judgment of the trial court is affirmed.

VAIDIK, J., and BARNES, J., concur.