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FILED
Jun 28 2011, 9:29 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

PONIE CLARK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-1006-CR-340
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D01-0909-MR-21

June 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Ponie Clark appeals his conviction for murder.[1] Clark raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in admitting into evidence portions of Clark's recorded police interview; and

II. Whether the court erred in declining to instruct the jury on the lesser included offense of voluntary manslaughter.

We affirm.

The relevant facts follow. Heather Hutchison was engaged to Jimmy Dydo for approximately four years, but they stopped living together in April of 2009. Hutchison and Dydo continued to talk to each other on the phone and see each other, and Dydo would sometimes stop by the house of Hutchison's parents unannounced. Hutchison worked with Guy Torres at a Kroger store, the two became friends, and the relationship had the "potential to become more than just friends." Transcript at 384.

On one occasion, Guy went to the Hutchisons' house to visit and parked in the driveway. While Guy was still in his vehicle, Dydo also arrived at the house and partially blocked Guy's vehicle in the driveway. Dydo confronted Guy and said that "he was going to kick his ass, if he didn't leave," and Guy eventually drove around Dydo's vehicle and drove away. Id. at 385.

Approximately one week later, Dydo called Hutchison and asked if he could meet her when she left work, and Hutchison told Dydo not to come to her work and that she had to go home and do school work. However, Dydo went to the Kroger where Hutchison worked and started to talk to her. While talking to Hutchison, Dydo saw Guy

[1] Ind. Code § 35-42-1-1 (Supp. 2007).

working and then Dydo "was on the phone saying he was going to call people to come up there and wait for Guy until he got off work." Id. at 387. Hutchison told Dydo to go outside because "he was going to get [her] fired, and then the cops were called." Id. Dydo went out to the parking lot, and Hutchison warned Guy about Dydo's "phone call trying to get some guys." Id. at 389.

Guadelupe Torres ("Lupe"), Guy's cousin, contacted Clark and explained that Guy "was about to be jumped at Kroger's," and Lupe picked up Clark and drove to the Kroger store. When Lupe and Clark arrived, they looked around and then went inside the store and spoke to Hutchison and Guy. Clark told Guy: "I got your back. Ain't nobody going to shoot you . . . ." Id. at 454. Clark also said that he "was going to handle it" and "felt like killing someone tonight" and then flashed a gun. Id. at 391. Police arrived at the store and talked to Hutchison, and a police officer escorted her home.

On the evening of September 6, 2009, Dydo arrived unannounced at the house of Hutchison's parents to talk to Hutchison and stayed for approximately twenty minutes. Meanwhile, Lupe called Clark, and, according to Clark, said that Dydo was "over there harassing [and] stalking [Hutchison] and wouldn't leave her alone." Id. at 455. Lupe drove his vehicle to pick up Clark, and the two went to Guy's house. About ten to fifteen minutes after Dydo left the Hutchisons' house, Hutchison called Guy because they had plans to hang out that night. After Guy spoke with Hutchison on the phone, Guy, Lupe, and Clark came to "an agreement" that Dydo and Guy were going to fight, but that Clark and Lupe "were going to stay out of it . . . or [Clark] was going to scare [Dydo] with the gun." Id. at 459.

Guy began to drive his vehicle to the Hutchisons' house, and Lupe and Clark followed behind Guy's vehicle. Once near the house, Guy drove around the block to make sure it was safe and then pulled up next to the house to park. Hutchison sat in the enclosed front porch of the house waiting for Guy. Dydo, who had been in his vehicle nearby, did "a U-turn" in the middle of the road, pulled up behind Guy's car, and walked up to the driver's window of Guy's car. Id. at 461.

Clark exited the vehicle and walked towards Dydo and Guy. Dydo started to talk to Guy, and Clark fired two shots at Dydo. Dydo turned and took off running down the sidewalk away from Clark, and Clark ran after and fired two additional shots at Dydo. When they got closer to the corner of the block, Dydo dropped to the ground, and Clark ran up to Dydo, stood over him, and shot at him three additional times. The first two shots misfired, but the third one did not. In total, Clark fired his weapon seven times, two of which the gun misfired and five of which "the gun actually went off." Id. at 467. Lupe pulled up near Clark, Clark entered the vehicle, and they drove away. Dydo died as a result of the gunshot wounds.

On September 9, 2009, the State charged Clark with murder. During Clark's jury trial, the court admitted into evidence portions of a recorded police interview with Clark. Also, Clark submitted proposed jury instructions regarding reckless homicide and voluntary manslaughter, and the court instructed the jury regarding reckless homicide but declined to instruct the jury regarding voluntary manslaughter. The jury found Clark

guilty of murder. Clark was sentenced to sixty years in the Indiana Department of Correction.[2]

I.

The first issue is whether the trial court abused its discretion in admitting into evidence a portion of Clark's recorded police interview. The admission and exclusion of evidence is a matter within the sound discretion of the trial court, and we will review only for an abuse of discretion. Wilson v. State, 765 N.E.2d 1265, 1272 (Ind. 2002). "An abuse of discretion occurs when the trial court's ruling is clearly against the logic, facts, and circumstances presented." Oatts v. State, 899 N.E.2d 714, 719 (Ind. Ct. App. 2009).

Clark argues that the court erred in admitting the recorded police interview. Clark argues that the "comments and physical demonstration by officers interviewing [him] about the shooting were not supported by the evidence at trial and by the forensic testimony," that the "danger is that the officers' version of events as played to the jury, and his demonstration of how he stated the shooting occurred, is taken by the jury as substantive evidence, in violation of Indiana Evidence Rule 403," and that the "limiting Instruction and final Instruction were insufficient to overcome the prejudice created by the admissions, and, in particular, the demonstration of the shooting, which physical image cannot be erased from the jury's mind." Appellant's Brief at 5. Clark further argues that the recording "contains out-of-court statements and demonstrations of police officers" which constitutes inadmissible hearsay. Id. at 5. Clark also argues that "[t]he

[2] Guy pled guilty to conspiracy to commit aggravated battery, and Lupe was convicted of murder and of assisting a criminal. See Torres v. State, No. 71A03-1007-CR-383, slip op. at 2 (Ind. Ct. App. Jan. 27, 2011), trans. pending.

issue becomes difficult because the tape itself is being offered as substantive evidence" and that "portions of the tape, i.e., officers' statements and demonstration . . . are hearsay," and Clark "contends it is unrealistic to believe that, even with an admonition and an Instruction, the jury can distinguish between the two." Id. at 6.

The State argues that the court acted within its discretion to admit Clark's recorded statement. With respect to the officers' alleged hearsay statements contained in the recorded interview, the State argues that Clark waived his claim because his objection at trial was "indistinct" and because he failed to develop a cogent argument on appeal regarding which of "the officers' oral statements he claims are problematic." Appellee's Brief at 6. With respect to the officers' demonstrations, the State argues that they were not offered for the truth of the matter asserted but that the officer demonstrated how he believed Clark shot Dydo in an attempt to elicit a statement from Clark. The State argues that the admitted evidence, a partially-redacted recorded interview, was relevant and that "[t]he court struck the proper balance when admitting the redacted statement by issuing a limiting instruction." Id. at 7. The State also argues that the court properly instructed the jury to disregard the officers' demonstrations and oral assertions and that, even if the recorded interview was admitted in error, the admission was harmless in light of the evidence adduced at trial, including Clark's testimony which was "nearly identical to his statement to police." Id. at 9.

With respect to the officers' statements made during the recorded interview, although Clark objected to the admission of the entire recorded interview, as the State notes Clark did not point at the time of his objection and does not on appeal point or cite

to the specific statements made by the officers during the recorded interview which he asserts are inadmissible as misleading or hearsay. Clark's arguments regarding the officers' statements are waived. Cooper v. State, 854 N.E.2d 831, 834 n.1 (Ind. 2006) (holding that the defendant's contention was waived because it was "supported neither by cogent argument nor citation to authority"); Espinoza v. State, 859 N.E.2d 375, 384 (Ind. Ct. App. 2006) (stating that it is well established that grounds for objection must be specific and any grounds not raised in the trial court are not available on appeal); see also Washington v. State, 808 N.E.2d 617, 625 (Ind. 2004) (noting that "a trial court cannot be found to have erred as to an issue or argument that it never had an opportunity to consider").

During the interview, the police officers presented to Clark how they thought the shooting may have occurred. We note that Clark does not challenge the voluntariness of his statements or the admissibility of his own statements in response to the police during the interview. Also, the fact that police make statements during a police interview which may not be true does not necessarily mean that a recording of the interview and the defendant's statements are inadmissible. See Washington, 808 N.E.2d at 622 (noting that two police officers' statements during an interview of the defendant were generally not true but did not render the defendant's statements involuntary). We also note that certain statements providing context for other admissible statements are not generally hearsay because they are not offered for their truth. See Williams v. State, 930 N.E.2d 602, 609 (Ind. Ct. App. 2010) (noting that a confidential informant's recorded statements

during controlled drug buys were nonhearsay because those statements merely provided context for the defendant's own recorded statements) (citation omitted), trans. denied.

After Clark objected to the admission of the recorded interview, the court overruled the objection and proposed an admonishment to give the jury, both before playing the recording and again later in the final instructions.[3] Clark did not object to the court's proposed admonishment.[4] Prior to playing the recording before the jury, the court admonished the jury, as it had proposed, as follows:

> I want to read to you, before we play this video: The statements, opinions, questions and conduct of the officers participating in the interrogation of the defendant are hearsay and are being admitted for a limited purpose. They are being admitted to provide context for any statements made by the defendant. Those statements, opinions, questions or conduct of the officers may not be considered as substantive evidence to establish any fact expressed by them. Just as with other forms of evidence introduced during the trial, the evidence on the recordings of the interviews must conform to the rules of evidence. Because of that, there may be times when you might notice the affects [sic] of the editing process when the recording is played in court. You are not to consider any such technical imperfections or any of the editing process. The only evidence actually presented to you, namely Mr. Clark's statements during the interview, should be considered.

Transcript at 431. "Reversible error is seldom found when the trial court has admonished the jury to disregard a statement made during the proceedings because a timely and accurate admonition to the jury is presumed to sufficiently protect a defendant's rights and remove any error created by the objectionable statement." Alvies v. State, 795 N.E.2d 493, 506 (Ind. Ct. App. 2003), trans. denied.

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[3] Copies of the final instructions are not included in the Appellant's Appendix.

[4] It appears that the proposed admonishment was taken from one of defense counsel's proposed instructions.

In addition, at trial the State elicited testimony from one of the officers regarding the officers' questions and demonstrations during the recorded interview, and the officer explained: "We throw out, they're called themes, to see how they react. Throw out a scenario to see if it's even remotely reacted upon by whoever we're interviewing." Transcript at 432. The officer's testimony regarding the interview and police questioning further reduced the likelihood that the jury considered the officers' questions and demonstrations as substantive evidence.

We also find, especially in light of the court's admonishment to the jury, that any prejudicial effect of the admission of portions of the recorded police interview did not substantially outweigh the probative value of the recording presented to the jury.

Based upon our review of the recorded police interview and the trial court's admonishment to the jury, we conclude that the court did not abuse its discretion in admitting the recording. See Wilson v. State, 765 N.E.2d 1265, 1270-1271 (Ind. 2002) (holding that the trial court did not abuse its discretion in admitting certain evidence and noting the court thoroughly admonished the jury regarding the use of the evidence).

II.

The second issue is whether the court erred in declining to give the jury Clark's proposed instruction on voluntary manslaughter. We apply a three-step analysis in determining whether a defendant was entitled to an instruction on a lesser-included offense. Wright v. State, 658 N.E.2d 563, 566-567 (Ind. 1995). We must determine: (1) whether the lesser-included offense is inherently included in the crime charged; if not, (2) whether the lesser-included offense is factually included in the crime charged; and if

either, (3) whether there is a serious evidentiary dispute whereby the jury could conclude the lesser offense was committed but not the greater offense. Id. If the "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. at 567. When the trial court makes a finding that a serious evidentiary dispute does not exist, we will review that finding for an abuse of discretion. Brown v. State, 703 N.E.2d 1010, 1019 (Ind. 1998).

A person commits murder when the person "knowingly or intentionally kills another human being." Ind. Code § 35-42-1-1. On the other hand, a person commits voluntary manslaughter when the person knowingly or intentionally kills another human being "while acting under sudden heat." Ind. Code § 35-42-1-3(a). Sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. I.C. § 35-42-1-3(b). The Indiana Supreme Court has defined "sudden heat" 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." Id. "Words alone cannot generate sudden heat." Perigo v. State, 541 N.E.2d 936, 939 (Ind. 1989). Further, "evidence that the defendant was 'angry' does not, standing alone, show sudden heat; there must be evidence that the victim provoked the defendant." Matheney v. State, 583 N.E.2d 1202, 1205 (Ind. 1992), cert. denied, 504 U.S. 962, 112 S. Ct. 2320 (1992).

Voluntary manslaughter is inherently included in murder. Horan v. State, 682 N.E.2d 502, 507 (Ind. 1997), reh'g denied. A trial court should grant a requested

voluntary manslaughter instruction if the evidence demonstrates a serious evidentiary dispute regarding the presence of sudden heat. Powers v. State, 696 N.E.2d 865, 868 (Ind. 1998).

During trial, Clark submitted a proposed jury instruction on voluntary manslaughter. Clark argued that the proposed instruction was warranted because the jury could have concluded "from the testimony that he acted upon what he saw was an aggressive act toward a person that he had a relationship with and that he acted instantaneously upon it and continued to do so, as one of the witnesses described things happened at a very fast pace . . . ." Transcript at 505-506. The court evaluated the merits of Clark's proposed voluntary manslaughter instruction and denied the proposed instruction. The court stated in part:

> Nothing that this court heard suggests the presence of sudden heat. What [Clark] described was a decision by [Clark] and his friends to take weapons down to [the street on which the Hutchisons' house was located]. Certainly there was no evidence that [Clark] was coming to a confrontation, but rather that they were, and either [Guy] was to beat up [Dydo] or that [Clark] was going to shoot at him or in some direction of and scare him. It was a whole rational – Maybe rational is the wrong choice of word, but it was a calculated plan. There was nothing suggesting sudden heat in the record, and I'm not going to instruct on sudden heat. There is not a serious evidentiary dispute presented.

Id. at 508.

Clark argues on appeal that there was a serious evidentiary dispute regarding whether sudden heat existed. Clark argues that, based upon his testimony, the jury could have concluded that he saw "an aggressive act toward his friend, and acted instantaneously upon it." Appellant's Brief at 6. Clark argues that "[t]hings happened

fast, which in effect, would be sudden heat." Id. Clark also argues that the victim "pulled up in an aggressive manner, made a u-turn in the middle of the street, got out and approached Guy," that "[o]ne hand was hidden while the other hand was poking into the vehicle," and that "[t]he described behavior on the part of the victim was such that could negate cool reflection and cause sudden heat." Id. at 7. The State argues that Clark's testimony and the statements made by Clark during the recorded police interview indicate that "there was no serious evidentiary dispute over sudden heat." Appellee's Brief at 12.

The record reveals that Clark, Guy, and Lupe had an understanding that there would be a fight or confrontation of some sort between Dydo and Guy and, "if things started to go south," Clark was "supposed to get out and start using [his] gun." Transcript at 471. Clark testified that he saw Dydo pull up behind Guy's vehicle and approach Guy's window. Clark further testified that he saw Dydo's "hand in the window pointing." Id. at 462. Clark indicated on cross-examination that, as he walked towards Dydo and Guy, he "just came up and started pulling the trigger." Id. at 474. Clark fired two shots at Dydo while Dydo was near Guy's vehicle. Clark further indicated that Dydo had done nothing to provoke him to start pulling the trigger and that he never saw a weapon in Dydo's hands. Clark also indicated that Dydo "was only up at [Guy's] car for . . . several seconds, before [he] came up and started shooting." Id. at 475.

The evidence shows that Dydo then immediately began to run down the street away from Clark and that Clark chased Dydo and fired two additional shots at Dydo. Dydo fell to the ground near the corner of the block, and Clark ran up to Dydo, stood over him, and pulled the trigger three additional times. Clark testified that the first two

shots while standing over Dydo misfired, but the third one did not. Clark also stated during his recorded police interview that, two weeks prior to the shooting, Guy had asked him to kill Dydo.

Don Anglin, who lived near the corner where Dydo fell, testified that he heard two shots and observed Clark chasing Dydo down the street. Anglin testified: "As [Dydo] was falling right before he hit the corner in the grass, [Clark] shot one more time. That one missed him, but then after [Dydo] fell down he shot right down at [Dydo]." Id. at 154. When asked if there was any doubt in his mind that Clark shot the victim and not out into the street, Anglin testified: "He was shooting the victim. He was not shooting in the street. No way." Id. at 164. Edward Runnion, who also lived near the corner, testified that he heard shots and observed Clark chase Dydo down the street. Runnion testified that Dydo fell down and Clark came up and shot Dydo in the back of the head. When asked if there was any doubt in his mind that Clark shot at Dydo's body and not out into the street, Runnion indicated that Clark "shot straight at [Dydo]" and "did not shoot out in the street." Id. at 171.

William Hutchison, Hutchison's father, testified that he was on the front porch with Hutchison when he observed Guy pull up in front of the house and Dydo pull up behind Guy's vehicle. William testified that Dydo went up to the driver's side of Guy's vehicle and made a very short statement and that Dydo did not have anything in his hands. William further testified that "[i]t was just a split second after [Dydo] had said something to Guy that we heard two shots ring out . . . and saw [Dydo] start to take off running . . . and a guy chasing right after him." Id. at 351. William also testified that,

after Dydo collapsed face-down, Clark ran up and fired three more shots. William also indicated that there was no chance at all that Clark was shooting out at the street instead of at Dydo.

Based upon the record, we conclude that there was no serious evidentiary dispute regarding whether Clark committed the offense causing the death of Dydo while acting in sudden heat. Accordingly, the trial court did not abuse its discretion in declining to give Clark's proposed instruction on voluntary manslaughter. See Collins v. State, 873 N.E.2d 149, 160 (Ind. Ct. App. 2007) (holding that a jury instruction on voluntary manslaughter was not warranted in the absence of appreciable evidence of sudden heat), trans. denied.

For the foregoing reasons, we affirm Clark's conviction for murder.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.