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IN THE
COURT OF APPEALS OF INDIANA

NATHANIEL RICHERSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0904-CR-159
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable J. Woodward Miller, Judge
Cause No. 71D01-0808-MR-13

September 4, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Nathaniel Richerson appeals his convictions for murder[1] and theft as a class D felony.[2] Richerson raises three issues, which we revise and restate as:

I. Whether the trial court erred in excluding a portion of Richerson's taped interview with the police discussing the possible sentence which might be imposed;

II. Whether the trial court erred in not giving an instruction on voluntary manslaughter as had been requested by Richerson; and

III. Whether the evidence is sufficient to sustain Richerson's conviction for murder.

We affirm.

The facts most favorable to the conviction follow. In the summer of 2008, Randy Guyberson was living at 219 East Dayton Street in South Bend, Indiana. Guyberson had from time to time opened his home to "street people . . . . offer[ing] them some place to live . . . charg[ing] them very little for rent . . . . Or they'd do work around the house and help him do work on the house to pay for their rent." Transcript at 184. Richerson moved in with Guyberson in late May or early June of 2008 after being kicked out of a program at the Life Treatment Center in South Bend. Guyberson and Richerson soon after developed a homosexual relationship.

On July 4, 2008, Richerson met Matthew Weidler outside of the Salvation Army rehabilitation program in South Bend where Weidler was staying at the time. Richerson and Weidler had known each other for "a couple of years" from time they had spent in

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

[2] Ind. Code § 35-43-4-2 (2004) (subsequently amended by Pub. L. No. 158-2009, § 11 (eff. July 1, 2009)).

Michigan. Id. at 464, 688. After meeting on July 4, 2008, Richerson and Weidler began using drugs together.

On or about August 5, 2008, Weidler tested positive for marijuana and was kicked out of the Salvation Army rehabilitation program. Weidler went to Guyberson's home looking for a place to stay. After Richerson spoke with Guyberson, it was agreed that Weidler could stay at Guyberson's home.

That same night, Weidler observed Guyberson and Richerson get into an argument about Richerson's desire to visit his ex-girlfriend in Michigan and also about Richerson having drug dealers over to Guyberson's house. This argument prompted Weidler to leave the home, walking north on Michigan Street. About ten or twenty minutes later, Richerson, driving Guyberson's van, cut in front of Weidler and told Weidler to get into the vehicle. Weidler noticed that Richerson had "red spots all over his jeans." Id. at 479. After Weidler got into the van, Richerson was not very talkative and was "[f]reaked out." Id. at 480. After driving for "a minute," Richerson showed Weidler that he had Guyberson's wallet, and Richerson told Weidler that they were going to Benton Harbor. Id. When Weidler asked Richerson what happened, Richerson got "very loud, and the radio kind of got turned down, and [Richerson] said, I killed the guy. What do you think?" Id. Richerson told Weidler that he stabbed Guyberson and slit Guyberson's throat because "[Richerson] did not want [Guyberson] to suffer." Id. at 481.

Richerson and Weidler then travelled to Benton Harbor, Michigan to purchase heroin. They arrived around midnight, and they purchased and used heroin soon after.

After using the heroin, Richerson and Weidler attempted to drive back to South Bend, but the van broke down. Richerson and Weidler then hitchhiked back to Guyberson's home.

Richerson and Weidler saw Guyberson's body upon entering the front door. Weidler noticed that Guyberson's throat was slit. Richerson and Weidler then agreed that they had to "get rid of [the body], clean it up, do something." Id. at 486. Weidler helped because he recognized that he was "in it now for the long haul, whether [he] like[d] it or not." Id. Richerson got some sheets from upstairs, and the two men wrapped Guyberson's body in the sheets. The two men then dragged Guyberson's body into the kitchen, and they put a plastic bag over Guyberson's head. Weidler cleaned up the blood in the living room, and Richerson cleaned up the blood in the dining room, hallway, and kitchen. They worked for about two or three hours, and then they buried Guyberson's body along with a knife in a shallow grave that Richerson and Weidler dug in Guyberson's back yard. The hole was filled in with the dirt that had been dug up, and then it was covered by some mulch, roof shingles, and lawn mowers. Richerson also burned the jeans that had blood on them. The men then cleaned themselves up, Richerson borrowed a pair of Weidler's jeans, and they stayed the night at Guyberson's home smoking crack and not sleeping.

Also on that day, Guyberson's brother, William Guyberson, made about "half a dozen" phone calls to Guyberson's home after Guyberson failed to take their Aunt Bun to an eye appointment. Id. at 185-186. The second time William called, a young man answered the phone stating that "Randy was gone, that he would be gone for quite sometime [sic]." Id. at 186-187. Ten minutes later, when William called again,

"[William] got a different voice, another young man, and [William] just asked for [Guyberson]. . . . [The young man] just hung up on [William], period." Id. at 187. When William tried again, the person on the other line answered and promptly hung up the phone.

The next day, both Aunt Bun and William phoned Guyberson again without any answer. William and his son, Kerry, were working that day in William's garage, and in the late afternoon William decided to go check on Guyberson at his house. All the lights in the home were on, the air conditioner was on, and the garage door was open, but nobody was home. Neither of Guyberson's vehicles, the van and a sedan, were at the house. Kerry spoke with Guyberson's neighbor across the street who told Kerry that "[the neighbor] had seen two young men coming in and out of the house with arms full of whatever. . . . And then get in the [sedan] and drive off." Id. at 190. William then called the police.

After the police arrived, Kerry kicked in Guyberson's back door and they observed that the house "looked like a tornado went through it." Id. at 191. The kitchen and living room were a mess, and in the basement there was a "[b]ig pile of blood," which had been leaking from the floor of the home's main level. Id. at 192, 320. The police called for cadaver dogs, but the dogs did not locate a body. The police also took a missing person report. The grave site was not excavated that night. The police did find Richerson's burned jeans. Before William and Kerry left the home they boarded up the windows and door on the first floor of the house.

That same day, August 7, 2008, Richerson and Weidler took Guyberson's sedan to Michigan. At some point during the drive, Richerson and Weidler stopped at Wal-Mart, and Richerson purchased a video game system and a game with Guyberson's credit card. Weidler promptly pawned the video game system and the game, and both Richerson and Weidler took the money to Benton Harbor to purchase drugs. Richerson and Weidler also visited with and picked up Richerson's ex-girlfriend.

After purchasing drugs in Benton Harbor and staying there for the night, the three drove back to Guyberson's house in South Bend. After reaching the house, Richerson drove past it and parked in a parking lot. Richerson asked Weidler to step out of the car, and Richerson told Weidler that he thought "somebody [was] there or something [was] not right." Id. at 502. Richerson's ex-girlfriend overheard Weidler and Richerson talking, and she asked them if they would take her back to Michigan, which they agree to do.

At a gas station in Michigan, the sedan failed to start back up, and Richerson called his father who drove Richerson and Weidler back to South Bend. When they got back to Guyberson's house, Richerson kicked in the door to gain entry. Richerson had two other people over to Guyberson's house that night. Richerson and the two others at some point left Weidler alone at the house. In the evening, Richerson called Weidler and told Weidler that there were police at the house. Weidler walked outside while still on the phone with Richerson, and Weidler was taken down by the police. The police told Weidler that he should ask Richerson to come to Guyberson's house. Before going to the house, Richerson turned to his friend, hugged her, and told her that he "might be going

away for a long time, and then [Richerson] asked [the other friend] to call [Richerson's] father and tell [the father] the same thing." Id. at 448. Both Richerson and Weidler were then arrested.

While still at the scene, Richerson, then seated in the back of a police car, was questioned by South Bend Police Officer Rick McGee. Officer McGee asked Richerson if he knew where Guyberson was, and Richerson first told McGee that he and Guyberson were lovers and that they had a "kind of falling out or something." Id. at 258. Richerson then "was just sitting there thinking, and then he start[ed] rocking back and forth, and he start[ed] crying and stuff, and he kind of kick[ed] the back of the seat of the police car, and he goes he's dead. He's dead; isn't he?" Id. Richerson and Weidler were then taken to the police station, and both were interviewed. Richerson signed a document stating among other things that he got into a wrestling match with Guyberson and "black[ed] out," and that after getting back to the house from Benton Harbor Richerson "start[ed] to realize what [he] did." Id. at 581; State's Exhibit 158.

At Guyberson's home, the police again used cadaver dogs, and this time the dogs located the grave site. The police also gathered fingerprint and DNA samples for examination and comparison. Richerson's fingerprints were matched with samples found on a Wal-Mart receipt for the video game system, on the van, and on a "saber blade" which was discovered in the home containing Guyberson's blood on it.

The State charged Richerson with murder and theft as a class D felony.[3] A jury trial was held beginning on February 2, 2009. During the trial, the State introduced without objection the taped interview with Richerson taken the night Richerson was apprehended by the police.[4] At the close of trial, Richerson offered a jury instruction on voluntary manslaughter,[5] to which the State objected. The trial court declined to read the instruction. The jury found Richerson guilty as charged on both counts, and the trial court sentenced Richerson to sixty years for murder and two years for theft to be served consecutively.

I.

The first issue is whether the trial court erred in excluding a portion of Richerson's taped interview with the police discussing the possible sentence which might be imposed.[6] 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). When evidence is "only marginally relevant, it is within the sound discretion of the trial court to admit it." Houston v. State,

[3] Weidler was charged with assisting a criminal. He pled guilty without any plea agreement.

[4] There was some discussion between the trial court and the parties about how to admit the taped interview which is discussed in part I.

[5] A copy of the proposed instruction is not in the record.

[6] Despite the fact that Richerson raises an issue directly concerning this taped interview, the tape or a transcript of the interview is not included in the record. We remind Richerson that, as the appellant, he bears the burden of presenting a record that is complete with respect to the issues raised on appeal. Ford v. State, 704 N.E.2d 457, 461 (Ind. 1998), reh'g denied.

730 N.E.2d 1247, 1250 (Ind. 2000). Also, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by a proper offer of proof, or was apparent from the context within which questions were asked." Ind. Evidence Rule 103.

On appeal, Richerson argues that the trial court erred when it excluded the portion of the taped interview because it was "relevant to show coercion and to help understand the full interview." Appellant's Brief at 6. Although Richerson does not point us to any portion of the record in particular, there was an exchange between the trial court and the parties about whether to play a portion of the tape where the interviewer discussed the amount of jail time Richerson could receive were he found guilty of murder leading up to the interview being played for the jury. Richerson argued to the trial court that:

> I think the statement, the whole setting, was coercive, and to tell Mr. Richerson, this is the amount of years you're looking at and to try to coerce him into making that confession. And, well, you know, if you just talk to us and be honest, you'll probably get out and go to college and dah, dah, dah, dah, dah. I think it was part of the whole coercive nature of the interview itself.

Transcript at 431. The State responded to Richerson's claim of what the excluded portion contained:

> [J]ust to make sure that we're clear, it was Mr. Richerson, as you will see on the tape, if you need to review that part of it who was doing the negotiation on. Says, can I get 10 years out of this? Is there a program out of this? Am I going to get out? You know. Is this going to be life? What prison? You know. There was all kinds of negotiation going on, as far as, can I get 10 years out of this? . . . [The interviewer] was answering the questions posed by the defendant, and I think that is quite clear. That's why we took it out. It's completely inappropriate.

Id. at 431-32. The trial court overruled Richerson's motion to include the portion of the interview because the trial court could not "reconcile . . . the fact that [the court is] required to tell the jury that they can not consider the sentence that the defendant might face with the fact that [the portion would] allow them to know the possible sentence . . . ." Id. at 433. The trial court did give Richerson an opportunity to later admit the excluded portion, however, stating:

> It may be, [Richerson's counsel], then it will be on the defendant to add that additional portion, at this point in time. I think I do have some discretion on that, and at this point what we have is a three-hour tape the state has prepared to at least begin the introduction of today, that you can offer the balance of tomorrow.

Id. at 432.

"An offer of proof consists of three parts: (1) the substance of the evidence, (2) an explanation of its relevance, and (3) the proposed grounds for its admissibility." Nelson v. State, 792 N.E.2d 588, 594 (Ind. Ct. App. 2003) (citing Roach v. State, 695 N.E.2d 934, 939 (Ind. 1998), reh'g granted on other grounds, 711 N.E.2d 1237 (Ind. 1999)), trans. denied. Based on the record, we cannot say that Richerson made an offer of proof in accordance with Ind. Evidence Rule 103. The above exchange being the only discussion of the excluded portion of the interview in the record, we cannot say that the substance of the evidence has been articulated. See e.g., Lashbrook v. State, 762 N.E.2d 756, 758 (Ind. 2002) (holding that a trial court ruling excluding evidence may not be challenged unless the substance of the evidence was made known to the court by a proper offer of proof).

II.

The next issue is whether the trial court erred in not giving Richerson's requested 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).

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 the 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). "Sudden heat is 'anger, rage, resentment, or terror sufficient to obscure the reason of an ordinary man; it prevents deliberation and premeditation, excludes malice, and renders a person incapable of cool reflection.'" Wilson v. State, 697 N.E.2d 466, 474 (Ind. 1998) (quoting McBroom v. State, 530 N.E.2d 725, 728 (Ind. 1988)), reh'g denied.

At the close of trial, the trial court evaluated the merits of Richerson's proposed voluntary manslaughter instruction:

> I'm having difficulty finding the evidentiary dispute over sudden heat. The defendant did say he did not commit this crime, although I don't think that alone is the test, because you look at evidence submitted by the state and the evidence submitted by the defendant as well.
>
> What I never heard was any evidence of fear or provocation, any evidence that would suggest that there was sudden heat. The evidence was that the decedent found this drug dealer in his home, threatened to call the police and demanded that the defendant leave. The defendant testified that that was not an uncommon occurrence, that he usually ended up sleeping in the tent. Which he actually liked. So there was nothing from that that someone could I believe infer sudden heat.

Transcript at 782-783. The trial court denied the proposed instruction. Thus, we must determine if a serious evidentiary dispute existed whereby the jury could have concluded Richerson committed voluntary manslaughter but not murder, and that therefore the trial court abused its discretion in denying Richerson's proposed instruction.

Richerson argues that evidence was presented at trial evidencing sudden heat. Specifically, Richerson argues that evidence was presented of an argument between Richerson and Guyberson in which Guyberson pushed Richerson toward the door, and that the wrestling which ensued, causing Guyberson to hit his head "demonstrate[d] the existence of anger and terror or fear." Appellant's Brief at 8.

However, although there may have been evidence of anger, "[a]nger standing alone is not sufficient to support an instruction on sudden heat." Wilson, 697 N.E.2d at 474. Richerson contends in his brief that in the dispute, "[Richerson] was also afraid, which caused him to strike back at Guyberson." Appellant's Brief at 8. Richerson does

not point us to any testimony in the trial transcript or other evidence of Richerson being afraid, and the trial court expressly noted in its ruling on the issue of whether to give a voluntary manslaughter instruction that it "never heard [] any evidence of fear . . . ." Transcript at 782. We therefore conclude that the trial court did not abuse its discretion in denying Richerson a jury instruction on voluntary manslaughter. See, e.g., 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.

III.

The last issue is whether the evidence is sufficient to sustain Richerson's conviction for murder. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm a conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

The State was required to prove that Richerson "knowingly or intentionally kill[ed]" Guyberson. Ind. Code § 35-42-1-1(1); Appellant's Appendix at 5. On appeal,

Richerson argues that "[t]here existed no greater evidence to have found Richerson guilty than was against Weidler." Appellant's Brief at 6. Richerson contends that both Richerson and Weidler were equally involved in stealing Guyberson's credit cards and property, burying Guyberson, and cleaning Guyberson's home, and that "[t]he only difference was that the State chose to file murder charges against Richerson . . . ." Id. at 5-6. Richerson concludes by arguing that "where as here, there were two conflicting versions, it is not necessary for the jury to have believed one and disbelieved the other."[7] Id. at 6.

Conflicting evidence was presented at trial, and Richerson's argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Drane, 867 N.E.2d at 146. Simply, Richerson asks this court to supplant the jury's finding of guilt based in part on Weidler's version of the events and instead believe Richerson's version. In addition to Weidler's testimony, the State presented evidence that Richerson and Guyberson were lovers, that Richerson burned his jeans, and that Richerson told a friend that he "might be going away for a long time . . . ." Transcript at 448. Based on the record before us, we conclude that the evidence is sufficient. See, e.g., Ware v. State, 859 N.E.2d 708, 724 (Ind. Ct. App. 2007) (holding that the State presented sufficient evidence for a jury to find defendant guilty of murder), reh'g denied, trans. denied.

[7] Richerson cites Gantt v. State, 825 N.E.2d 874 (Ind. Ct. App. 2005), for this proposition. Gantt involved an erroneous jury instruction which directed the jury that it "*must* believe one or the other." Id. at 878. Not only is Gantt not a case about the sufficiency of the evidence, but also there was no such instruction from the trial court in this case that the jury must believe either Weidler's or Richerson's version of the events. The jury heard the conflicting evidence, and it was free to make its decisions thereon.

For the foregoing reasons, we affirm Richerson's convictions for murder and theft as a class D felony.

Affirmed.

CRONE, J., concurs.

MAY, J., concurs in result.