MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Kyle Anthony Gray,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

December 29, 2022

Court of Appeals Case No. 22A-CR-456

Appeal from the Lake Superior Court

The Honorable Gina L. Jones, Judge

Trial Court Cause No. 45G03-1806-MR-9

Mathias, Judge.

[1] Kyle Anthony Gray was convicted in Lake Superior Court of murder, murder while committing arson, and two counts of arson. Gray appeals and presents two issues for our review:

I. Whether the trial court abused its discretion when it rejected his proffered jury instruction on two lesser-included offenses.

II. Whether his convictions violate double jeopardy principles.

[2] We affirm in part, reverse in part, and remand with instructions.

Facts and Procedural History

[3] During the early morning hours of June 28, 2018, Gray called 9-1-1 to report a fire at the residence in Gary where he lived with his grandmother Barbara Walker. By the time emergency personnel arrived, the fire was no longer "actively burning in the house[.]" Tr. Vol. 3, p. 106. EMT Julie Dolato entered the house to look for occupants who might need assistance, and she found Walker lying supine in a bedroom. Walker was unresponsive, and Dolato could not move her by herself. Dolato directed firefighters to the bedroom, and they removed Walker from the house. Outside, Dolato examined Walker and found that she had sustained multiple burns all over her body, and she quickly determined that Walker was deceased. As emergency personnel investigated the fire, Gray was observed outside, "leaning up against a car." *Id.* at 91.

[4] An autopsy performed later that day revealed that Walker's burns had occurred after her death. The autopsy also revealed that Walker had been smothered, which caused her to lose consciousness, but she continued to take shallow breaths after the fire started. The cause of Walker's death was determined to be "asphyxia due to smoke inhalation and a smothering," and the "manner of death [was] a homicide." *Id.* at 202.

[5] Gary Police Department Sergeant Kristopher Adams interviewed Gray twice on June 28. "[I]n the first interview, [Gray] gave a story stating that he had gotten home from work, had an altercation with his grandmother, and then left to take a long drive. He later, in the second interview, advised that that was a complete lie." Tr. Vol. 4, p. 30. Between the two interviews, police had searched Gray's vehicle and found "several weapons" and an item of clothing that "smelled of gasoline." *Id.* at 34. During his second interview, Gray gave a written statement as follows:

> It was an accident. Our discussion didn't go as I stated earlier. We were at each other[']s throats yelling and screaming, trying to out do one another. She got off her [sic] swinging her cane and started hitting me. After so much I just snapped and pushed her away. As she got up to continue hitting me I tried to walk away, but she kept coming. Standing at the front door I walked to the burgundy van and grabbed the gas can stating "I would burn this down just leave me alone." She didn't listen and I got angrier and started striking the matches by the gas can that was in my hand. I struck 1 to scare her but it caught hold to the gas and was in flames. I tossed the can making gas go everywhere and the flames got to[o] big so I ran away in fear.

Ex. p. 82.

[6] The State charged Gray with murder, murder while committing arson, and two counts of arson, one as a Level 2 felony and one as a Level 4 felony. During his ensuing jury trial, Gray asked the trial court to instruct the jury on reckless homicide as a lesser included offense of murder and on criminal mischief as a lesser included offense of the arson charges. The trial court denied those requests. The jury found Gray guilty as charged. The trial court entered judgment of conviction on each count, but the court entered sentences only for murder and Level 4 felony arson. The court sentenced Gray to an aggregate term of sixty-five years. This appeal ensued.

Discussion and Decision

Issue One: Jury Instructions

[7] Gray asserts that the trial court abused its discretion when it declined to instruct the jury on reckless homicide as a lesser included offense of murder and on criminal mischief as a lesser included offense of the arson charges. "Instructing the jury is a matter within the discretion of the trial court, and we'll reverse only if there's an abuse of that discretion." *Cardosi v. State*, 128 N.E.3d 1277, 1284 (Ind. 2019).

[8] Further,

> [w]hen a defendant requests an instruction covering a lesser-included offense, a trial court applies the three-part analysis set forth in *Wright v. State*, 658 N.E.2d 563, 566-67 (Ind. 1995). The first two parts require the trial court to determine whether the

> offense is either inherently or factually included in the charged offense. *Id.* If so, the trial court must determine whether there is a serious evidentiary dispute regarding any element that distinguishes the two offenses. *Id.* at 567; *see also Brown v. State*, 703 N.E.2d 1010, 1019 (Ind. 1998). *Wright* held that, "if, in view of this dispute, a 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." *Wright*, 658 N.E.2d at 567. Where a trial court makes such a finding, its rejection of a tendered instruction is reviewed for an abuse of discretion. *Brown*, 703 N.E.2d at 1019.

Wilson v. State, 765 N.E.2d 1265, 1271 (Ind. 2002) (footnote omitted). "In our review, we accord the trial court considerable deference, view the evidence in a light most favorable to the decision, and determine whether the trial court's decision can be justified in light of the evidence and circumstances of the case." *Leonard v. State*, 80 N.E.3d 878, 885 (Ind. 2017) (quotation marks omitted).

[9] Murder is defined as a person who "knowingly or intentionally kills another human being." Ind. Code § 35-42-1-1(1) (2022). And reckless homicide is defined as a person who "recklessly kills another human being." I.C. § 35-42-1-5. The only distinguishing feature in the elements of murder and reckless homicide is the mens rea required of each offense. *McDowell v. State*, 102 N.E.3d 924, 931 (Ind. Ct. App. 2018). Reckless homicide is therefore an inherently included offense of murder. *Id.*

[10] On appeal, Gray asserts that there was a serious evidentiary dispute as to whether he knowingly or recklessly killed Walker. Specifically, Gray contends

that "the intent to kill was in dispute given Gray's written statement to the police, which, if believed by the jury, provided clear evidence that Gray's actions were in fact reckless." Appellant's Br. at 12. To support his assertion, Gray relies on this Court's opinion in *Porter v. State*, 671 N.E.2d 152 (Ind. Ct. App. 1996), *trans. denied*. In that case, we affirmed the trial court's jury instruction on battery with a deadly weapon as a lesser included offense of murder. The defendant's sole argument on appeal was that "the charging information so closely tracked the murder statute that the State was not entitled to an instruction on battery with a deadly weapon or on attempted voluntary manslaughter." *Id.* at 153. The defendant did not challenge the trial court's determination that there was a serious evidentiary dispute whether the defendant had intended to kill the victim. Thus, while we noted, in passing, that the record showed a serious evidentiary dispute, including the defendant's own statement that he had not intended to shoot the victim, our analysis in *Porter* is inapposite here. *Id.* at 154.

[11] However, Gray ignores the evidence that Walker had been smothered and died before her body sustained burns. Gray's second statement only explains the fire, but not the smothering. As the State puts it, "Gray's self-serving statements to the detectives are irreconcilable with the physical evidence generated by Gray's crimes," including the evidence that Walker had been strangled and lost consciousness before the fire reached her. Appellee's Br. at 16. Based on that evidence, there was no serious evidentiary dispute permitting the jury to find that Gray recklessly killed Walker. *See, e.g.*, *Vanryn v State*, 155 N.E.3d 1254,

1266 (Ind. Ct. App. 2020) (holding no serious evidentiary dispute whether defendant murdered victim where victim died as the result of "a very hard punch or a fall from a three-story building.") The trial court did not abuse its discretion when it declined to instruct the jury on reckless homicide.

[12] Next, Gray contends that the trial court abused its discretion when it did not instruct the jury on criminal mischief as a lesser included offense of arson. Again, he asserts that there is a serious evidentiary dispute on the mens rea element based on his statement to the police. And he argues that the trial court erroneously relied on this Court's opinion in *Myers v. State*, 422 N.E.2d 745 (Ind. Ct. App. 1981), when it declined to give his proffered instruction.

[13] A person commits Level 4 felony arson if he, by means of fire, knowingly or intentionally damages the dwelling of another person without the other person's consent. Ind. Code § 35-43-1-1(a). A person commits criminal mischief if he recklessly, knowingly, or intentionally damages or defaces property of another person without the other person's consent. I.C. § 35-43-1-2. The distinguishing features in the elements of these offenses are: the mens rea, the means used to damage another person's property, and the nature of the property. Criminal mischief is therefore an inherently included offense of arson.

[14] In *Myers*, we held that there was no serious evidentiary dispute to support an instruction on criminal mischief where "there was no dispute as to whether or not the distinguishing elements of damage by fire to a dwelling had been established." 422 N.E.2d at 748. Specifically, we stated that "the evidence was

uncontroverted that [the victim's] dwelling had been damaged by fire. Thus, if Myers was the party guilty of damaging [the] dwelling (property) he was guilty of arson and not criminal mischief." *Id.* In other words, we held that, where the evidence is undisputed that the damaged property is a dwelling, there is no dispute to support an instruction on criminal mischief. Likewise, here, because there is no dispute that Gray set fire to a dwelling, we cannot say that the trial court abused its discretion when it declined to instruct the jury on criminal mischief. *See id.*

[15] In sum, Gray has not shown that the trial court abused its discretion when it declined his proffered jury instructions on reckless homicide and criminal mischief.

Issue Two: Double Jeopardy

[16] Finally, Gray contends, and the State agrees, that the trial court erred when it entered judgment of conviction on all four counts but "merged" two of the convictions at sentencing and sentenced Gray only for murder and Level 4 felony arson. Gray and the State argue that double jeopardy concerns require that Gray's convictions for murder while committing arson and Level 2 felony arson be vacated, and we agree. It is well settled that "if the trial court does enter judgment of conviction on a jury's guilty verdict, then simply merging the offenses is insufficient and vacation of the offense is required." *Kovats v. State*, 982 N.E.2d 409, 414-15 (Ind. Ct. App. 2013). Accordingly, we reverse Gray's convictions for murder while committing arson and Level 2 felony arson and

remand to the trial court with instructions to vacate those convictions. Gray's concurrent sentences for murder and Level 4 felony arson are unaffected.

[17] Affirmed in part, reversed in part, and remanded with instructions.

Robb, J., and Foley, J., concur.