MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Lavell Holloway,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 28, 2021

Court of Appeals Case No. 20A-CR-2247

Appeal from the Lake Superior Court

The Honorable Samuel L. Cappas, Judge

Trial Court Cause No. 45G04-1709-MR-7

Najam, Judge.

Statement of the Case

[1] Lavell Holloway appeals his conviction for murder, a felony, following a jury trial. Holloway raises three issues for our review, which we revise and restate as the following two issues:

1. Whether the trial court erred when it admitted the testimony of an unavailable witness.

2. Whether the trial court abused its discretion when it declined to instruct the jury on reckless homicide.

[2] We affirm.

Facts and Procedural History

[3] On the evening of January 26, 2017, Kadejah Jackson went to a shopping center with her mother, Aisha Lucas; her grandmother, Ernestine Lucas; and her sister, Reilleekh Jackson. While there, the group of women encountered Kashena Hayes. Kadejah and Hayes were both dating Holloway, and Hayes shares a child with Holloway. Kadejah and Hayes proceeded to get into a physical altercation, and other members of Kadejah's family got involved. Security officers broke up the fight and asked all involved to leave the mall.

[4] Kadejah and her family ultimately returned to their home shortly after midnight the next morning. Approximately ten minutes after they had returned, the family heard someone bang on the front door. Reilleekh looked out the window and saw Hayes, Tehanna Jackson, and one other woman. Reilleekh

observed that Hayes was swinging a "stick" or "some type of weapon" that she had in her hand. Tr. Vol. 3 at 178. The women did not answer the door.

[5] A few minutes later, Aisha, Reilleekh, and Kadejah exited the house through a side door to make sure that Hayes and the two women "wasn't [sic] touching" the car that was parked on the driveway. *Id*. at 180. When they exited the house, the women did not initially see Hayes or the other two women. However, a moment later, they saw Hayes driving Holloway's vehicle toward the house. Hayes stopped the car "right in front of" the house. *Id*. at 182. Once Hayes stopped the car, Holloway "pop[ped] out" of the passenger door and "start[ed] shooting." *Id*. at 76. Holloway fired ten shots in approximately five seconds before he got back in the car, at which point Hayes drove away. Two of the bullets struck Kadejah, and seven bullets hit the side of the home. Kadejah ultimately died of her injuries.

[6] Aisha called 9-1-1, and officers with the Hammond Police Department ("HPD") responded to the scene. While there, officers collected evidence, including nine bullet casings. They also spoke to members of Kadejah's family, who informed officers that Holloway was the shooter. Soon thereafter, officers located Holloway and his vehicle. Upon searching the vehicle, officers found a bullet casing in the "recessed area" of the windshield. Tr. Vol. 4 at 129. Officers also recovered a handgun from the passenger side floorboard near the center console. Officers later determined that all of the shell casings recovered from the scene had been fired from the gun found in Holloway's car.

[7] During the ensuing investigation, officers obtained security footage from a neighboring house. That video shows a car pull up and stop near Kadejah's house. *See* Ex. 124A. The video then shows a man exit the car, point a gun over the roof of the car in the direction of the women in the driveway, quickly fire a series of shots, and get back in the car and leave. *See id*.

[8] Also during the investigation, Tehanna informed HPD Detective John Suarez that a man named Davell Ware had told her that he was the shooter. As a result, Detective Suarez investigated Ware. However, other than Tehanna's statement, Detective Suarez did not obtain any other evidence that Ware had been at the scene.

[9] The State charged Holloway with murder, a felony. The court then held a five-day jury trial beginning on August 24, 2020. At the trial, Aisha testified that, on the night of the shooting, she had seen Holloway exit the car and start shooting "straight towards" her and her daughters. Tr. Vol. 3 at 136. She further testified that she did not have "any doubt" that Holloway was the person who had shot Kadejah. *Id*. at 146. And Reilleekh testified that she had witnessed Holloway exit the passenger door of the car, "put his arm over the car" and start shooting. *Id*. at 182.

[10] HPD Corporal Benjamin Stombaugh testified that the bullet holes in the house were not "real close" to one another. Tr. Vol. 4 at 4. On cross-examination, Holloway asked Corporal Stombaugh if the location of those bullet holes indicated that the gunshots were "sporadic." *Id*. at 6. Corporal Stombaugh

responded that he could not conclude whether the gunshots were sporadic because "the slightest movement in your hand can make a vast different in [the] accuracy of your gunshot." *Id*. at 6-7. And HPD Corporal Ryan Orr testified that he had observed bullet damage to the roof of Holloway's vehicle that indicated that the shooter had fired "[f]rom the passenger's side over the hood towards the driver's side[.]" *Id*. at 132.

[11] The State then informed the court that it had intended to call Ernestine as a witness but that she was unavailable to testify due to an illness, so the State sought to admit testimony she had given at a bail hearing in March 2017. In support of that request, the State questioned Aisha, who is Ernestine's daughter. Aisha testified Ernestine was suffering from a "[l]oss of memory," and that a doctor had diagnosed Ernestine with early-stage dementia. *Id*. at 177. Aisha also testified that Ernestine requires "[a] lot of attention" and that she "has to be fed, bathed, changed, everything." *Id*. at 178-79. And Aisha testified that Ernestine has "observed things in the room that are not there" and that she is not able to have a conversation that "makes sense." *Id*. at 179, 183.

[12] The court determined that Aisha's testimony was "totally credible," and concluded that Ernestine was unavailable to testify. *Id*. at 187. The court then admitted the testimony Ernestine had given at the bail hearing. Ernestine testified that she had seen Holloway "jump[] out of the car with the gun" and "start[] shooting." *Id*. at 200. She further testified that she had "clearly" seen Holloway and that she was "positive" that it was him. *Id*. at 202.

[13] After the close of evidence, Holloway requested that the court instruct the jury on reckless homicide as a lesser included offense to murder. Holloway asserted that the evidence demonstrated that there was "no aiming" and "no deliberation" during the offense but that it was "wild shooting." Tr. Vol. 5 at 183. The court found that the shooter had "used the hood of the car as a rest for the firearm, which assists people in the aiming of the firearm." *Id*. at 186. The court continued that there "was a pattern of bullets sprayed across the front of the house," which the court interpreted as the shooter "tracing" the individuals as they ran. *Id*. at 187. The court did "not see reckless behavior" from any of the evidence and declined to give Holloway's proffered instruction. *Id*. at 188. The jury found Holloway guilty as charged, and the court entered judgment of conviction and sentenced him accordingly. This appeal ensued.

Discussion and Decision

Issue One: Admission of Ernestine's Testimony

[14] Holloway asserts that the trial court erred when it admitted Ernestine's testimony. On this issue, Holloway first contends that the admission of that testimony violated his confrontation rights under the Sixth Amendment to the United States Constitution because Ernestine was not unavailable.

> The Sixth Amendment to the United States Constitution provides: In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. The Fourteenth Amendment make this right of confrontation obligatory upon the state. The essential purpose of the Sixth Amendment right of confrontation is to ensure that the defendant has the opportunity to cross-examine the witnesses against him.

> As this Court has recognized, the right to adequate and effective cross-examination is fundamental and essential to a fair trial. It includes the right to ask pointed and relevant questions in an attempt to undermine the opposition's case, as well as the opportunity to test a witness' memory, perception, and truthfulness.

Howard v. State, 853 N.E.2d 461, 464-65 (Ind. 2006) (cleaned up).

[15] The admission of a hearsay statement made by a declarant who does not testify at trial violates the Sixth Amendment "if (1) the statement was testimonial and (2) the declarant is unavailable and the defendant lacked a prior opportunity for cross-examination." *Id*. at 465. The Court emphasized that, "if testimonial evidence is at issue, then 'the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.'" *Id*. (quoting *Crawford v. Washington*, 541 U.S. 36, 68 (2006)). Whether a witness is unavailable for purposes of the Confrontation Clause is a question of law we review *de novo*. *See Fowler v. State*, 829 N.E.2d 459, 465-66 (Ind. 2005).

[16] Here, Holloway contends that the trial court erred when it determined that Ernestine was unavailable and admitted her testimony identifying him as the shooter based on her diagnosis of dementia because, according to Holloway, the contention that a person is unavailable due to an inability to recall information "has been specifically refuted by the United States Supreme Court[.]" Appellant's Br. at 21 (citing *United States v. Owens*, 484 U.S. 554, 559-60 (1988), in which the Supreme Court stated that the Confrontation Clause has

been satisfied even if the declarant is unable to recall the events in question so long as the witness appears at trial and testifies to his inability to remember).

[17] However, we agree with the State that any error in the court's conclusion that Ernestine was unavailable and subsequent admission of her prior testimony was harmless. Our Supreme Court has previously explained that "violations of the right of cross-examine are subject to harmless-error analysis." *Smith v. State*, 721 N.E.2d 213, 219 (Ind. 1999). An "otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Koenig v. State*, 933 N.E.2d 1271, 1273 (Ind. 2010).

[18] At Holloway's trial, Aisha testified that, on the night of the shooting, Hayes drove Holloway's car and parked it in front of her home. She also testified that, at that point, Holloway "pop[ped]"out of the front passenger seat and "start[ed] shooting." Tr. Vol. 3 at 76. And she testified that she did not have "any doubt" that Holloway was the shooter that night. *Id*. at 146. Similarly, Reilleekh testified that Hayes stopped Holloway's car in front of her house, at which point she saw Holloway get out of the passenger door and "start shooting." *Id*. at 183. In addition, officers discovered a firearm on the passenger side of Holloway's vehicle. Officers were also able to determine that all of the shell casings found at the scene had been fired from that firearm. And officers observed damage to the roof of Holloway's vehicle that tracked from the passenger side to the driver's side. Based on the record as a whole, we can

say with confidence that any error in the admission of Ernestine's testimony identifying Holloway as the shooter was harmless beyond a reasonable doubt.

[19] Still, Holloway also asserts that the trial court abused its discretion when it admitted Ernestine's prior testimony because that testimony violated Indiana Evidence Rule 804(a) and (b). But "[a]n error in the admission of evidence" under our Rules of Evidence "is harmless where the 'probable impact' of the erroneously admitted evidence, 'in light of all the evidence in the case, is sufficiently minor so as to not affect the substantial rights' of the defendant." *Caesar v. State*, 139 N.E.3d 289, 292 (Ind. Ct. App. 2020) (quoting Ind. Appellate Rule 66(A)). For the same reasons that any error in the admission of Ernestine's testimony was harmless beyond a reasonable doubt, we hold that any error in the admission of the evidence under Indiana Evidence Rule 804 was sufficiently minor so as to not affect Holloway's substantial rights. As such, any error in the admission of Ernestine's prior testimony was harmless.

Issue Two: Jury Instruction

[20] Finally, Holloway asserts that the trial court abused its discretion when it declined to instruct the jury on reckless homicide as a lesser included offense to murder. "Instructing the jury is a matter within the discretion of the trial court, and we'll reverse only if there's an abuse of discretion." *Cardosi v. State*, 128 N.E.3d 1277, 1284 (Ind. 2019). "[W]e look to whether evidence presented at trial supports the instruction and to whether its substance is covered by other instructions." *Batchelor v. State*, 119 N.E.3d 550, 554 (Ind. 2019).

[21] 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).

[22] Murder is defined as a person who "knowingly or intentionally kills another human being." Ind. Code § 35-42-1-1(1) (2021). 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*.

[23] On appeal, Holloway asserts that there was a serious evidentiary dispute as to whether he had knowingly or recklessly killed Kadejah. Specifically, Holloway contends that the surveillance video demonstrates that the "shooter exits the passenger seat, reaches his right arm towards the home, and begins firing the gun, prompting [Kadejah] and her family to run . . . out of the view of the shooter." Appellant's Br. at 14. He further contends that the evidence demonstrates that, of the ten shots fired, "roughly half of them occur after [Kadejah] and her family are out of view," and that seven of the bullets struck the home "several feet from where [Kadejah] and her family were located." *Id*. Holloway maintains that the "pattern of bullets alone leads to questions as to whether the shots were indeed intended for" Kadejah. *Id*. at 14-15.

[24] To support his assertion, Holloway relies on our Supreme Court's opinion in *Young v. State*, 699 N.E.2d 252 (Ind. 1998). In that case, a group of individuals were outside of a house when Young drove up, stopped his car, and fired two shots. *Id*. at 254. One shot struck a victim, who died of his injuries. *Id*. at 255. Young drove off, turned around, and fired four more shots even though everyone but the victim had entered the house. *Id*. at 254-55. During an investigation, the witnesses gave "various" answers when asked about the target of Young's shots. *Id*. at 254. However, none of the witnesses could say whether Young had been shooting at a specific person or if he had just been shooting wildly. *Id*. At his ensuing jury trial for murder, Young requested a jury

instruction on reckless homicide, which the court declined to give, and the jury found Young guilty.

[25] On appeal, our Supreme Court determined that the evidence regarding Young's state of mind was "conflicting and obscure." *Id*. at 256. The Court pointed to evidence that the witnesses knew Young and that there had been no problems between Young and anyone in the group in front of the house. *Id*. Further, there was evidence that Young had no reason to be upset with the victim. *Id*. The Court also pointed to evidence that the witnesses could not determine whether Young was shooting at any particular person or just engaged in "wild shooting." *Id*. And the Court considered the fact that, of the six shots fired, only one hit the victim while another was discovered "rather far away" in the wall of a neighboring home. *Id*. Based on that evidence, the Court concluded that a jury could have found that Young had acted recklessly but not knowingly and that the court had erred when it refused to instruct the jury on reckless homicide. *Id*. at 257.

[26] We find the facts of *Young* to be distinguishable. First, unlike in *Young* where Young did not have a problem with any member of the group, there is evidence that Holloway had a motive to shoot at Kadejah. Indeed, the evidence demonstrates that Hayes, who is the mother of Holloway's child, was upset with Kadejah following an altercation earlier that day. Further, while the majority of the shots fired hit the house, two of them struck the very person with whom the mother of his child had fought. And, while the bullet holes in the house were not "real close" to one another, none of the bullets struck a

neighboring house, as was the case in *Young*. Tr. Vol. 4 at 4. In addition, the officers could not say whether the distance between the bullet holes was indicative of "sporadic" shooting because even "the slightest movement in your hand can make a vast difference" in the accuracy of a gunshot. *Id*. at 6. Further, unlike in *Young*, the trial court made specific findings regarding the bullets and determined that the pattern of bullet holes demonstrated that the shooter had "trac[ed]" the group of women as they fled. Tr. Vol. 5 at 187. Thus, Holloway's reliance on *Young* is misplaced.

[27] The evidence most favorable to the court's decision demonstrates that, following an altercation between Hayes and Kadejah, Hayes went to Kadejah's home with "some type of weapon" and banged on the door. Tr. Vol. 3 at 178. Then, a few minutes after the banging had stopped, Kadejah and some family members exited the house, and they saw Hayes driving Holloway's vehicle toward the house. The evidence further demonstrates that Hayes stopped the car in front of the house, at which point Holloway "pop[ped]" out of the car and "start[ed] shooting" in the direction of the women. *Id*. at 76. Indeed, Reilleekh testified that Holloway "put his arm over the car," as he aimed at the women. *Id*. at 182. Holloway fired ten shots in approximately five seconds, two of which hit and ultimately killed Kadejah. And the evidence demonstrates that Holloway's car had bullet damage that was limited to just the "middle area" of the roof. Tr. Vol. 4 at 158.

[28] In other words, the evidence demonstrates that Holloway exited his car, used the roof of his car to aim in the direction of Kadejah, and deliberately fired ten

shots. Based on that evidence, we cannot say that the trial court abused its discretion when it determined that there was not a serious evidentiary dispute regarding Holloway's *mens rea*. We therefore affirm the court's denial of Holloway's proffered jury instruction.

Conclusion

[29] In sum, any error in the admission of Ernestine's prior testimony was harmless in light of all of the evidence before the jury. And the trial court did not abuse its discretion when it declined to instruct the jury on reckless homicide. We therefore affirm Holloway's conviction.

[30] We affirm.

Pyle, J., and Tavitas, J., concur.