MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Courtney M. Moss,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

April 28, 2023

Court of Appeals Case No. 22A-CR-2002

Appeal from the Lake Superior Court

The Honorable Salvador Vasquez, Judge

Trial Court Cause No. 45G01-2008-MR-33

Memorandum Decision by Chief Judge Altice
Judges Weissmann and Foley concur.

Altice, Chief Judge.

Case Summary

[1] Following a jury trial, Courtney Moss (Defendant) was convicted of murdering Rayvon Harris (Victim) at a gas station in Gary, Indiana. Security cameras from various locations in the area caught much of the events leading up to and including the shooting, providing video but no sound.

[2] The incident directly involved three other men – Myles Thomas, Willie Jones, and Roy Akins – who were hanging out with Defendant nearby in the hours leading up to the shooting. Defendant, Thomas, and Akins were each armed with a firearm. Victim was not.

[3] The shooting occurred as the result of an altercation between Thomas and Victim that began outside and then moved inside the gas station. The verbal encounter inside escalated when Jones stepped in and punched Victim. As Jones and Thomas began to attack Victim, who had backed into a corner, Defendant stood nearby armed and ready. Thomas's handgun fell out of his waistband during the melee, and as he and Victim struggled over it, the gun discharged, and a bullet struck Jones in the leg. Defendant then fired three shots at Victim. Akins ran inside once the shooting began and fired at least two shots from across the store. Defendant fired his fourth and final shot directly at Victim, who was slumped in a corner with his hands up near his head.

[4] In a matter of seconds, Victim had been shot seven times, by at least two different firearms. Victim suffered four fatal gunshot wounds to his torso and

three non-fatal gunshot wounds to his right leg. Victim died at the scene shortly after the men fled.

[5] On appeal, Defendant presents the following restated issues for appeal:

1. Did the trial court err in refusing to instruct the jury on aggravated battery?

2. Did the State present sufficient evidence that Defendant caused Victim's death?

3. Did the trial court abuse its discretion by admitting into evidence a photograph of Defendant at the time of his arrest sitting handcuffed in the backseat of a police cruiser?

[6] We affirm.[1]

Facts & Procedural History

[7] In the early morning hours of August 22, 2020, Defendant was with Thomas, Jones, and Akins on the premises of Bugsy's Bar in Gary. Jones and Akins hung out in Defendant's car, while Thomas and Defendant spent time inside the bar, as well as in the parking lot. Defendant was armed at all relevant times with a Glock 43 9 mm handgun (the Glock). Thomas had a black handgun that he carried in his waistband, and Akins had a "big rifle." *Transcript Vol. 5* at 24.

[1] Oral argument was held at Eastern Hancock High School on April 14, 2023. We are grateful for the warm welcome from the school administrators, staff, and students, as well as the local bar.

[8] Around 3:00 a.m., the men were in the parking lot when their attention appeared to be drawn toward 45th Avenue. Victim was on the other side of the street and began walking toward the nearby intersection at Broadway. Thomas crossed 45th and followed Victim, from a distance, through the intersection and toward the gas station. The two exchanged words. As they each made it across Broadway, Defendant then began to walk through the middle of the intersection.

[9] The verbal exchange between Thomas and Victim continued briefly outside of the gas station until Thomas punched Victim, who then pushed Thomas away and hurried inside. Victim stood away from the door and near the checkout counter, where there were female patrons. For about a minute, Thomas stood at the open door and spoke in an animated manner as the female patrons appeared to attempt to calm Thomas. Victim initially stood by silently but then responded verbally, which caused Thomas to fully enter the store as Defendant continued holding the door.

[10] In the meantime, Jones had driven Defendant's car over to the gas station, and Akins came in another vehicle. Jones went inside to buy a drink and, while in the back of the store, overheard the disagreement, which escalated with Victim exclaiming, "F*ck that. I'll kill y'all." *Transcript Vol. 2* at 175. As Victim, who was unarmed, began to take a fighting stance, Jones ran in from the side and struck Victim, catching him off guard. Thomas, Jones, and Defendant then all approached Victim, who backed away into a corner. Defendant had his gun drawn as Thomas punched Victim multiple times and Jones kicked him.

[11] During the attack, Thomas's handgun fell from his waistband, and he and Victim struggled for control as the handgun discharged, striking Jones once in the leg. Defendant then began firing the Glock toward the left side of Victim's body. Victim fell to the ground, and Jones and Thomas, who had regained control of his gun, fled. Victim sat slumped against the side of a beverage cooler, between a shelf and a stack of boxes of soda, with his hands raised to his head, and Defendant shot him one more time. Akins had also rushed in with his semi-automatic rifle by this point and started shooting from a distance. Akins fired at least two shots toward Victim's right leg.

[12] From start to finish, the physical portion of the confrontation inside the store lasted about thirty seconds. Victim was still alive when his four assailants fled, but he was lifeless within minutes. Victim suffered seven gunshot wounds. Three shots entered from his left side and were fatal,[2] striking his left lung, heart, and liver. There were exit wounds associated with each of these fatal shots. A fourth shot, also fatal, entered Victim's left chest/abdomen area and exited his lower posterior left side.[3] The three other gunshot wounds were to his right leg and were not fatal. One entered the front of his right thigh (with no exit wound) and the other two grazed the back of his right thigh.

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[2] The angle of these three shots was "from left to right, back to front and downward." *Transcript Vol. 4* at 61.

[3] This shot was front to back, left to right, and downward.

[13] Immediately after the shooting, Defendant drove away with Jones, while the others left in another vehicle. Defendant took Jones to a hospital in Hobart for treatment of the gunshot wound to his leg. On the way to the hospital, Defendant told Jones, "Damn I f**ked up." *Transcript Vol. 3* at 181. After checking Jones into the emergency room, Defendant drove away and was stopped by police shortly thereafter. At the time of his stop, Defendant was wearing the same clothing as during the shooting and had a hospital visitor tag on his shirt. The Glock was recovered under the driver's seat of his vehicle.

[14] Relevant here, investigators recovered six shell casings and two spent bullets from the scene at the gas station. A firearms expert later determined that four of the spent casings had been fired from the Glock. The two other casings were from a "223 Remington … rifle round." *Transcript Vol. 4* at 110. One of the spent bullets was recovered from the beverage cooler and the other was recovered inside a soda can within the boxes of soda that were next to Victim's body (to his left). Both spent bullets were 9 mm rounds but only the one found in the soda was positively identified as having been fired by the Glock.

[15] At his jury trial for murder, Defendant testified and claimed that he acted in self-defense when he shot Victim multiple times after Jones was shot by Thomas's gun. Defendant acknowledged that he shot Victim, who was on the ground, one last time before walking away with the others because "[Victim] was still moving." *Transcript Vol. 5* at 13. Defendant claimed that this last shot was to Victim's leg.

[16] Jones testified for the State and indicated that Victim was unarmed, appeared scared, and was trying to defend himself as he was backed into a corner by Thomas, Jones, and Defendant. Additionally, Jones testified that although Thomas and Victim struggled over Thomas's gun after it was dropped, Victim never obtained exclusive control over it.

[17] The jury was instructed on both murder and voluntary manslaughter, as well as self-defense. The trial court rejected Defendant's request for an instruction on aggravated battery. Ultimately, the jury found Defendant guilty of murder. He then waived trial by jury on the firearm enhancement, and the trial court entered judgment on the enhancement. Defendant was sentenced to fifty-eight years for murder, enhanced by seven years, for an aggregate sentence of sixty-five years.

[18] Defendant now appeals. Additional evidence will be provided below as needed.

Discussion & Decision

1. Aggravated Battery Instruction

[19] Defendant argues that the trial court erred by denying his request for a final jury instruction on aggravated battery. We review a trial court's decision to refuse a jury instruction for an abuse of discretion. *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015). In doing so, we consider: "(1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is

covered by other instructions which are given." *Id*. Only the second of these is at issue in this case.

[20] A criminal defendant is entitled to have a jury instruction on any theory or defense which has some foundation in the evidence. Id. This is true "even if the evidence is weak and inconsistent so long as the evidence presented at trial has some probative value to support [the instruction]." *Id*.

[21] Here, the trial court rejected the instruction based on its finding that there was no serious evidentiary dispute pursuant to which the jury could have concluded that Defendant committed an aggravated battery but not murder. In so ruling, the trial court noted the number of lethal shots, the number of casings found that matched the Glock, and the spent bullet that was linked to the Glock. In sum, the trial court stated, "This is not an aggravated battery case." *Transcript Vol. 5* at 89.

[22] On appeal, Defendant argues, as he did below, that the instruction was supported by the evidence. Specifically, he claims that the evidence was unclear as to whether he fired one of the four fatal shots or whether his fired bullets simply grazed Victim, missed him completely, or struck his leg. In this regard, Defendant notes the trial court's observations that (1) no one knew the precise order of the shots and that (2) Defendant testified that his final shot was to Victim's leg. The trial court suggested, however, that the final shot "could have been a shot to the chest" but "we don't know." *Id*.

[23] The State directs us to *Lehman v. State*, 730 N.E.2d 701 (Ind. 2000), in which the Supreme Court affirmed the trial court's rejection of an aggravated battery instruction in a murder case. The Court explained that if an offense is included in the charged offense, whether inherently or factually,[4] "the trial court must determine whether there is a serious evidentiary dispute regarding any element that distinguishes the two offenses." *Id*. at 703. It is error to refuse the lesser-included instruction if, in light of an evidentiary dispute, the jury "could conclude that the lesser offense was committed but not the greater." *Id*.

[24] "A person knowingly kills when he is aware of a high probability that he is engaged in killing." *Id*. at 704. In contrast, "[t]he offense of aggravated battery consists of the knowing or intentional infliction of injury on a person that creates a substantial risk of death or causes serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ." *Id*. (citing Ind. Code § 35-42-2-1.5). "Thus, an instruction on aggravated battery would not be warranted if there was no serious evidentiary dispute that the defendant was aware of a high probability that he was engaged in killing." *Id*.

[25] In *Lehman*, the defendant choked his victim twice, each time to the point of unconsciousness. When the victim regained consciousness the second time, he choked her again and then punched her in the front of her neck, breaking her

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[4] The State also suggests, for the first time on appeal, that aggravated battery is not an inherently lesser included offense of murder. Defendant disagrees and argues that even if not inherently included, it is factually included in this case given the firearms enhancement. We need not reach this issue, however, due to our determination regarding whether there is a serious evidentiary dispute.

neck. At his murder trial, the defendant testified that he intended only to cause her to lose consciousness and claimed that he did not know a "sleeper hold" could kill. The Supreme Court concluded that "the trial court did not abuse its discretion in concluding that there was no serious evidentiary dispute upon which the jury could have concluded that the defendant committed an aggravated battery but not a knowing killing." *Id*. at 705.

[26] Here, the evidence establishes that Defendant intended to shoot Victim multiple times with the Glock at relatively close range. Indeed, Defendant acknowledged his intent at trial but attempted to justify his actions by claiming self-defense. Additionally, the shooting is documented on video, and firearms evidence established that he shot the Glock four times. Defendant's own testimony indicated that he shot Victim after Jones was shot with Thomas's handgun and that he shot Victim one last time before leaving because Victim was still moving. While Defendant claimed at trial that his last shot was to Victim's leg, the video evidence does not bear this out.

[27] In sum, we conclude that the trial court did not abuse its discretion by determining there was no serious evidentiary dispute that Defendant was aware of a high probability that he was engaged in killing when he shot Victim with the Glock. From the evidence presented, the jury could not have found that Defendant committed aggravated battery but not a knowing killing.

2. Sufficiency

[28] Defendant next challenges the sufficiency of the evidence supporting his murder conviction.[5] When reviewing the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor assess the credibility of witnesses. *Fix v. State*, 186 N.E.3d 1134, 1138 (Ind. 2022). "When there are conflicts in the evidence, the jury must resolve them." *Young v. State*, 198 N.E.3d 1172, 1176 (Ind. 2022). Thus, on appeal, we consider only the probative evidence and the reasonable inferences supporting the conviction and will affirm "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Fix*, 186 N.E.3d at 1138 (quoting *Jackson v. State*, 50 N.E.3d 767, 770 (Ind. 2016)). Stated differently, our task is to "decide whether the facts favorable to the verdict represent substantial evidence probative of the elements of the offenses." *Young*, 198 N.E.3d at 1176 (quoting *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007)).

[29] Defendant's argument on appeal is that the State failed to present evidence that any of his shots struck Victim. In other words, while acknowledging that he shot at Victim four times, Defendant essentially claims that he could have just been a bad shot. In the alternative, Defendant argues that even if the jury could reasonably conclude that one (or more) of the shots he fired struck Victim, the

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[5] Defendant presents sufficiency arguments under both Indiana law and federal due process. He recognizes, however, that our Supreme Court has held that the federal standard articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979), is equivalent to the one employed in our review of state sufficiency claims. *See e.g.*, *Ortiz v. State*, 766 N.E.2d 370, 374 n. 2 (Ind. 2002). Accordingly, there is no need to parse the claims. *See id*.

State failed to establish that it was one of the fatal shots or that it accelerated Victim's death.

[30] More specifically, Defendant notes that Victim was shot seven times and that only four of the shots were potentially lethal. Defendant accounts for each of the four shots the he fired as follows: (1) hit Jones in the leg; (2) went into the beverage cooler; (3) went into sodas stacked on the floor; and (4) might have been the fatal fourth shot to the chest but, according to Defendant, the State failed to prove that Victim was still alive when Defendant fired his final shot.

[31] Putting aside the obvious issue of accomplice liability, we find Defendant's argument to be nothing more than a request for us to reweigh the evidence. Much of his account of the evidence is incorrect, and it certainly does not consider the evidence in the light most favorable to the jury's verdict.

[32] First, the jury could reasonably infer that the bullet that hit Jones in the leg was fired from Thomas's handgun while Thomas and Victim were struggling over possession of it. Indeed, Defendant testified that he did not begin shooting until Jones was shot.

[33] Second, it is unclear whether the bullet recovered from the beverage cooler came from Thomas's or Defendant's gun, as the firearm's expert could not definitively link the bullet to the Glock and Thomas's gun was never recovered. Moreover, the bullet could have certainly passed through Victim's body before entering the cooler.

[34] Finally, and most notably, the violent shooting was caught on video from two different angles, and a reasonable juror viewing the videos could conclude that Defendant shot all or most of the fatal shots. The three fatal shots to Victim's left flank were precisely in the area and angle at which Defendant is seen shooting. And Defendant's fourth shot looked to be consistent with the fatal shot to Victim's chest (and aligned with where the spent bullet, found to have been fired from the Glock, would have exited into the box of sodas), while the shots taken by Akins were toward Victim's right. The video also belies Defendant's suggestion that Victim might have already been dead when Defendant took his fourth and final shot. That is, Victim can be seen raising his arm up in the seconds after his assailants fled the scene, dying shortly thereafter. Additionally, the pathologist testified that all of Victim's wounds showed tissue reaction and bleeding, which indicated that "all the shootings [were] antemortem." *Transcript Vol. 4* at 809.

[35] The State presented ample evidence to support the murder conviction.

3. Admission of Evidence

[36] Defendant contends that the trial court abused its discretion by admitting into evidence, over his timely objection, a photograph depicting Defendant in the back of a police squad car with his hands (presumably) cuffed behind his back. The photograph was taken upon Defendant's arrest following the traffic stop that occurred after he left Jones at the hospital. The photograph showed Defendant in what appeared to be the same clothing that he was wearing during the shooting, and his shirt now had a visitor tag for the hospital.

[37] On appeal, an abuse-of-discretion standard applies to a trial court's decision regarding the admissibility of evidence. *Hall v. State*, 177 N.E.3d 1183, 1193 (Ind. 2021). "We will reverse only if the trial court's ruling was clearly against the logic and effect of the facts and circumstances before it and errors affect a party's substantial rights." *Id*.

[38] The photograph in question – Exhibit 45 – was admitted during the testimony of Detective David Bloch, who was with the crime scene investigations unit of the Lake County Sheriff's Department and was responsible for collecting evidence and taking photographs of the scene. Detective Bloch testified that as he was finishing up that morning at the homicide scene, he was called to the scene of the traffic stop involving a suspect. He responded to this second scene to photograph the vehicle and the suspect. At this point, Defendant objected to Exhibit 45 being shown to the jury, arguing that it was an improper picture of his pretrial confinement. The State responded that it was simply being used to show the scene upon the evidence tech's arrival on the scene.

[39] In overruling the objection, the trial court stated:

> In the final instructions, the jury will be instructed that the fact that the defendant has been arrested and charged is no evidence of guilt. There is probative value that he was found at the scene. He was brought to a position of being in custody. But given the final instruction that the Court will give to the jury, I find there to be a lack of sufficient prejudice to keep this item out.

Transcript Vol. 3 at 82.

[40] Upon admission of the photograph, Detective Bloch testified that the picture was taken at the scene of the traffic stop and that it was of "the driver of the vehicle, the suspect." *Id*. at 85. He also noted that in the photograph the individual is wearing a visitor's pass from St. Mary's Hospital. Later in the trial, Officer Matthew Teer with the Hobart Police Department, who was involved in the traffic stop, testified in reference to Exhibit 45 that it depicted the driver that he pulled over. Officer Teer also testified that the driver was wearing the visitor's pass for St. Mary's Hospital at the time of the stop.

[41] On appeal, Defendant argues that Exhibit 45 was irrelevant and unduly prejudicial. Regarding relevancy, Defendant acknowledges that pictures may be admitted to orient the jury and help them understand the evidence or for purposes of identification. He asserts, however, that the State did not offer Exhibit 45 for these purposes. Even if relevant, Defendant argues that the photograph was unduly prejudicial because it portrayed him as a dangerous person and was "tantamount to a mugshot" or "analogous to [him] appearing before the jury in physical restraints." *Appellant's Brief* at 23.

[42] "A trial court's discretion is wide on issues of relevance and unfair prejudice." *Snow v. State*, 77 N.E.3d 173, 176 (Ind. 2017). Our Supreme Court has emphasized that determinations regarding whether evidence is relevant under Evidence Rule 401 or whether its probative value is substantially outweighed by the danger of unfair prejudice under Evidence Rule 403 can often be resolved by a trial court either way. *Snow*, 77 N.E.3d at 177.

[43] Evidence is relevant when it has "any tendency" to prove or disprove a consequential fact, and this standard "sets a low bar." *Id*. Here, the photograph showed Defendant still wearing the hospital visitor's pass. It linked him to the hospital where Jones was admitted with a gunshot wound and connected Defendant to that part of the timeline. The photograph also linked Defendant to the vehicle, which matched the one seen in the videos and contained the Glock, and showed Defendant in the same clothing as the shooter in the videos.

[44] Regarding prejudice, we observe that the handcuffs are not visible in the photograph and, more importantly, it would be common sense for the jury to presume that Defendant would have been detained by police at the scene of the felony traffic stop. *See Wheeler v. State*, 749 N.E.2d at 1111, 1114 (Ind. 2001) (observing that the "typical objection to mug shots" involves photographs taken at the time of a prior arrest and that, regarding those related to the current arrest, a jury would "naturally presume that appellant was arrested on the instant charge"). Additionally, the jury was instructed by the trial court during final instructions that the fact Defendant was arrested and brought to trial could not be used as any evidence of guilt.

[45] Under the circumstances, the trial court did not abuse its discretion by determining that the probative value of Exhibit 45 was not outweighed by the danger of unfair prejudice. Further, we agree with the State that any error in the admission of this photograph was harmless. *See Littler v. State*, 871 N.E.2d 276, 278 (Ind. 2007) (Harmless error is an error that does not affect the

substantial rights of a party, the determination of which is ultimately a question of the likely impact of the evidence on the jury.). That is, given that the jury viewed video evidence of the actual shooting, the one photograph of Defendant following his arrest hours later likely had little impact on the jury.

[46] Judgment affirmed.

Weissmann, J. and Foley, J., concur.