MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Donjulian Lamar Hobson,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

June 13, 2022

Court of Appeals Case No. 21A-CR-1640

Appeal from the Lake Superior Court

The Honorable Samuel L. Cappas, Judge

Trial Court Cause No. 45G04-1808-MR-014

Baker, Senior Judge.

Statement of the Case

[1] After the execution-style killing of Antonio Adams and attempted murder of his friend, pregnant Natasha Vargas, Donjulian Lamar Hobson was convicted by a jury of the attempted murder charge as to Vargas. He now appeals from his conviction of one count of Level 1 felony attempted murder,[1] contending that the trial court abused its discretion by rejecting his request for the court to instruct the jury using the pattern instruction for the crime of battery resulting in serious bodily injury as a lesser-included offense of attempted murder. We affirm.

Facts and Procedural History

[2] By July of 2018, Natasha Vargas and her longtime boyfriend Antonio Adams were living in an apartment in Gary, Indiana. Natasha, who was pregnant with Adams' child, referred to Adams by the nickname Pookie. Vargas had known Hobson since middle school, she claimed he was her cousin through marriage, and the two referred to each other as "cuz." Tr. Vol. 3, pp. 76-77. Vargas also occasionally referred to Hobson as "Don-Don." *Id.* at 77. Vargas used those nicknames during her testimony at trial.

[3] On the morning of July 14, 2018, Vargas and Adams were "chill[ing]" and smoking marijuana at their apartment. *Id.* at 72. Adams left for a short time

[1] Ind. Code § 35-41-5-1 (2014) (attempt); Ind. Code § 35-42-1-1 (2017) (murder).

and returned with a stolen handgun. Later in the evening, Hobson joined Vargas and Adams at their apartment and the three smoked marijuana. Adams and Hobson had a private conversation before telling Vargas that they were leaving. Vargas, however, told the two that she was going to join them. Just prior to leaving, Adams handed Hobson a handgun, the one he had stolen earlier in the day. The three entered Hobson's vehicle and drove a short distance to a nearby residential area. Vargas saw Hobson exit the vehicle, walk to the back of the house, and then go inside. There was no explanation for what Hobson was doing there either before he left or after he returned to the vehicle.

[4] Hobson then drove again for a few minutes and stopped the car a second time. He turned the car's engine off, and they all exited the vehicle. The three walked in silence as Hobson led Adams and Vargas down an alleyway that was partially overgrown with vegetation. Adams and Vargas followed behind Hobson, holding hands and talking about their baby. When they were about halfway down the alley, Hobson stopped and pulled a gun from the pocket of his sweatshirt and aimed it at Adams. Vargas, who thought that they were about to be robbed, sank to her knees, and put her hands in the air. She then said to Hobson, "can you not do nothing stupid? I'm pregnant. We're about to have a baby." *Id.* at 88.

[5] While kneeling on the ground, Vargas heard a gunshot, followed by a second, and saw Adams fall to the ground. She then saw Hobson walk up to her, and she felt him strike her in the back of the head multiple times with an object that

felt like the handle of his gun. Vargas then heard a third gunshot and lost consciousness while hearing the sounds Hobson made while fleeing the scene.

[6] Vargas was lying next to Adams in the alleyway when she regained consciousness. She attempted to lift Adams, but he was too heavy and felt "wet." *Id.* at 90. She ran through the bushes to a nearby street, where she was able to flag down a passerby for help. Police officers and EMTs were called to the scene to tend to Vargas' injuries. Vargas told Gary Police Officer Corporal James Nielsen that she had been walking with an individual named "Don," that her boyfriend "Antonio" saw them, that "[t]hey all started fighting and that Antonio was battering her," and that she heard a shot and saw that Adams was dead. *Id.* at 214-15.

[7] Gary Police Officer Erik Ivan observed Vargas' injuries at that time, noting that she had a swollen eye, blackening in the middle of her face, and that the back of her head was "very . . .bloody." Tr. Vol. 4, p. 50. Vargas was transported to Methodist Lakeside Hospital for treatment. A CT scan revealed that Vargas had a depressed skull fracture to the occipital area of her head, temporal contusions, an acute fracture to the left posterior part of her skull, and a penetrating injury with metallic fragments lodged in her parietal lobe. Vargas was intubated and transported to University of Chicago Hospital, where she was admitted. Vargas chose not to have the bullet surgically removed and still has bullet fragments in her brain. She said that she was unaware that she had been shot until the doctors and nurses at the University of Chicago Hospital told her.

[8] Officers were unable to find Adams' body on the night of the killing. Two days later, a man searching for scrap in the alleyway discovered Adams' body lying near a light pole. Police confirmed that the body was Adams based on chest tattoos.

[9] Dr. Zho Wang of the Lake County Coroner's Office performed an autopsy the next day. The autopsy revealed that Adams suffered two gunshot wounds to the head. The first was a graze wound to the forehead that was likely not fatal, and a second wound to the back of the head was consistent with a gunshot entrance wound. The second wound was located on the right back side of Adams' head and the trajectory ran back to front, and right to left. The bullet was recovered from the left orbital area of Adams' head. The bullet had torn through Adams' skull, his brain tissue, and his brain stem, rupturing his left eye. Dr. Wang concluded that based on all of these findings, Adams' injuries were the result of an "execution shooting" that likely resulted in "instant death." *Id.* at 161-62. He ruled the killing a homicide and listed Adams' cause of death as two gunshot wounds to the head.

[10] Officers were informed by Vargas' caregivers that it would take some time for her memory to return completely. And that was borne out by Vargas' difficulty in providing answers to officers and her confusion of Hobson's and Adams' names during her recorded interview in her hospital room. She was, however, able to positively identify Hobson from a photo array. Officer Nicholas Wardrip indicated at trial that Vargas appeared to be "laboring" to recall what had happened on the evening of July 14 because of her injury, but that he did

not believe she was being untruthful during that recorded interview. *Id.* at 93-94. Vargas had given varying accounts prior to trial of who possessed the gun, where and when they did so, and how the three of them ended up in the alleyway that night. For example, she said that Adams had the gun first in the alleyway, that there had been a physical confrontation between Hobson and Adams, and that she "guess[ed] Don must have been able to get the gun away from [Adams], and that's essentially when [Adams] got shot." *Id.* at 87. However, she also said that the gun was exchanged between Hobson and Adams in the car. And during another account during the interview, she said that things "were supposed to go smooth" and she and Adams had "plans on going back home," but the situation "went left." *Id.* at 92-93. She also stated in her interview that she did not think Hobson meant to kill Adams.

[11] On August 13, 2018, the State charged Hobson with murder, Level 1 felony attempted murder, and Level 4 felony unlawful possession of a firearm by a serious violent felon. The State also filed a firearm sentencing enhancement with respect to the first two counts. At the conclusion of his jury trial, Hobson was found not guilty of murder but guilty of attempted murder. He pleaded guilty to the possession of a firearm by a serious violent felon charge. He was then sentenced to an aggregate sentence of twenty-eight years in the Department of Correction and now appeals.

Discussion and Decision

[12] At trial, Hobson's defense was comprised of two parts. As for the murder charge, Hobson argued self-defense given that some of the facts suggested there was an apparent struggle for the firearm, evidence of Adams' gang affiliation, and Adams' history of domestic violence toward Vargas. As for the attempted murder charge, Hobson requested a jury instruction on the lesser-included offense of battery resulting in serious bodily injury, arguing that there was a question of intent as to the shot that struck Vargas based on testimony that there was a struggle for the gun. The trial court denied that request. Hobson argues that the court abused its discretion in its ruling because "[a] court is required to provide this instruction where a serious evidentiary dispute exists as to the intent to kill." Appellant's Br. p. 8.

[13] When a trial court decides to give or refuse a jury instruction, we apply an abuse of discretion standard on appeal. *Hernandez v. State*, 45 N.E.3d 373, 376 (Ind. 2015). On review, 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.* We will reverse a conviction only where the appellant demonstrates that the instructional error prejudiced his substantial rights. *Id.*

[14] The State argues that Hobson's claim is waived for failure to bring it before the court. *See* Appellant's Br. pp. 15-16. However, where possible, we prefer to

address cases on the merits and do so here. *See Armstrong v. State*, 932 N.E.2d 1263, 1270 (Ind. Ct. App. 2010).

[15] The three-step analysis a trial court must perform in situations requiring a decision on giving lesser-included offense instructions is: 1) to compare the statute defining the crime charged with the statute defining the alleged lesser-included offense to determine if it is inherently included in the crime charged; 2) if the alleged lesser-included offense is not inherently included in the crime charged, then the court must compare the statute defining the alleged lesser-included offense with the charging instrument; and, 3) if the alleged lesser-included offense is either inherently or factually included in the crime charged, the court must look at the evidence presented by both parties to see if there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense. *Wright v. State*, 658 N.E.2d 563, 567-68 (Ind. 1995).

[16] Hobson concedes that battery resulting in serious bodily injury is not inherently included in the offense of attempted murder, *see* Appellant's Br. pp. 10-11, and we agree. So, we turn to the second step and compare the statute defining the lesser-included offense with the charging instrument.

[17] Though not tendering a proposed instruction on battery as a lesser-included offense of attempted murder, Hobson cited to Indiana Pattern Jury Instruction Number 3.1200 when arguing at trial. That instruction informs the jury as follows:

> The crime of battery is defined by law as follows:
>
> A person who knowingly or intentionally [touches another person in a rude, insolent, or angry manner] [in a rude, insolent, or angry manner places any bodily fluid or waste on another person] commits battery, a Class B misdemeanor …. [The offense is a Level 5 felony if (it results in serious bodily injury to another person) (it is committed with a deadly weapon) (it results in bodily injury to a pregnant woman if the person knew of the pregnancy).]
>
> Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:
>
> 1. The Defendant
>
> 2. knowingly or intentionally
>
> 3. [touched _____ (name), another person]
>
> 4. in a rude, insolent, or angry manner …
>
> [7. (for Level 5 felony) (and the offense resulted in serious bodily injury to _____ (name), another person) (or) (and the offense was committed with a deadly weapon)]…
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of battery, a … (Level 6/5 felony), charged in Count _____.
>
> Ind. Pattern Jury Instruction No. 3.1200.

See Appellant's Br. p. 10; Appellee's Br. p. 18.

[18] As for the charging instrument, the State alleged as follows:

> COUNT II
> [ATTEMPTED MURDER (a Level 1 Felony)]
>
> Gregory Wolf, upon oath, says that on or about July 14, 2018, in the County of Lake, State of Indiana, DONJULIAN LAMAR HOBSON while acting with the specific intent to kill, did

> intentionally attempt to kill another human being, to wit: Natasha Vargas, by shooting Natasha Vargas in the head, contrary to I.C. 35-42-1-1(1) and I.C. 35-41-5-1(a) and against the peace and dignity of the State of Indiana.

Appellant's App. Vol. 2, p. 24.

[19] At trial, Hobson's counsel argued that the lesser-included instruction was necessary and proper for two reasons. First, because although there was evidence that Hobson shot Vargas, Vargas testified that she did not know she was shot, and second because there was also evidence that Hobson pistol-whipped Vargas. Counsel argued "there's not enough evidence to say that he shot at her because she says I passed out or I didn't know I was shot, so she can't say that his intent was to kill her if he only hit her twice on the head, which was her testimony." Tr. Vol. 5, p. 63. The court denied the request, stating that you can infer the intent to kill "by the manner in which a deadly weapon is used. He stood above her and shot her in the head," *id.*, i.e., Vargas did not need to know that she was shot in order to establish Hobson's specific intent to kill her.

[20] To prove Level 5 felony battery, the State is required to establish, under Indiana Code section 35-42-2-1(c) and (g) (2018), that there was a knowing or intentional touching of another person in a rude, insolent or angry manner and a resulting serious bodily injury, and in this case, that a handgun was used. Though Hobson's pistol-whipping of Vargas would fall within the statute, the charging instrument alleged the shooting. *See Pinkston v. State*, 821 N.E.2d 830,

841 (Ind. Ct. App. 2004) ("it can be said that battery is factually a lesser-included offense of attempted murder in this instance" involving shooting). However, in this case, Hobson sought the instruction to aid his argument in regard to a different means to Vargas' injury not alleged in the charging information, i.e., that she was pistol whipped. So, though the battery factually is a lesser-included offense here, the court did not abuse its discretion by rejecting the instruction. After all, a "trial court may refuse an instruction which has the tendency to mislead or confuse the jury." *See Eddy v. State*, 496 N.E.2d 24, 27 (Ind. 1986). The proffered instruction might have confused the jury in this circumstance.

[21] Nonetheless, we turn to the next step in the court's instructional considerations–whether there is a serious evidentiary dispute as to any element that distinguishes attempted murder from battery. At trial, Hobson supported his argument that there was a serious evidentiary dispute by attacking Vargas' credibility as an eyewitness to the shooting and challenged the validity of the officers' investigation into the shooting. To that end, he challenged every statement she gave from her statements to police immediately after being shot, to her recorded statement, her let-bail hearing testimony, and her deposition. Vargas admitted that in the latter of the two statements she lied about whether she knew that Adams had a gun prior to the shooting and whether she was afraid of Hobson.

[22] As for the tactics of investigating law enforcement officers, Hobson elicited testimony from the officers about the hospital-room interview where Vargas

was told "we need you so we can get Don," and information allegedly omitted from their reports, suggesting that Adams' body might have been moved, and beliefs about Vargas' credibility given her varying accounts. Tr. Vol. 4, p. 81.

[23] The trial court held a conference on its final jury instructions, during which Hobson requested both a self-defense instruction and an instruction on Level 5 felony battery resulting in serious bodily injury as a lesser-included offense of the attempted murder charge. The trial court noted that the self-defense charge would be unavailable to Hobson as to the attempted murder charge.

[24] Turning to the attempted murder charge, Hobson replied that "the State has failed to show intent to shoot her," and "[w]e don't know which–no one can say which bullet struck Natasha Vargas. Was she struck during the struggle between himself and Mr. Adams? No one–there's been no evidence presented by the State." Tr. Vol. 5, pp. 48-49. Hobson said that the instruction on the lesser-included offense was warranted because Vargas "did at least testify that at one point Mr. Hobson pistol-whipped her" and "the jury could believe that [Hobson] came up, pistol-whipped her . . . but then say there's not enough evidence to say that he shot at her because she says [she] has passed out or I didn't know I was shot." *Id.* at 62-63.

[25] The court, however, found that specific intent could be inferred by the manner in which a deadly weapon is used, there was no serious evidentiary dispute, and denied the request. We find no abuse of discretion here, as the evidentiary

dispute is based on Hobson's argument about pistol-whipping and not about the charged offense of shooting.

[26] In sum, we find no error here, and conclude that the court did not abuse its discretion in denying Hobson's request.

Conclusion

[27] In light of the foregoing, we conclude that the trial court did not abuse its discretion by denying Hobson's requested instruction.

[28] Affirmed.

Brown, J., and Weissmann, J., concur.