ATTORNEY FOR APPELLANT

Brian A. Karle
Ball Eggleston, PC
Lafayette, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General

J.T. Whitehead
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Perise L. Fowler,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

March 7, 2022

Court of Appeals Case No. 21A-CR-1596

Appeal from the Marion Superior Court

The Honorable Grant W. Hawkins, Judge

Trial Court Cause No. 49D31-1810-MR-37045

Crone, Judge.

Case Summary

[1] Perise L. Fowler appeals his conviction, following a bench trial, for murder.[1] The sole issue presented for our review is whether the trial court erred in denying his oral motion, made during the sentencing hearing, to reconsider its guilty verdict for murder and to enter judgment of conviction on the lesser included offense of voluntary manslaughter that was not argued at trial. Finding no error, we affirm.

Facts and Procedural History

[2] In October 2018, Niesha Turner lived with Byron Miller, and was pregnant with his child. Byron's brother, Quentin, also lived in the home located on North Rural Street in Indianapolis. At that time, Fowler was staying with his mother in her home which was next door.

[3] On October 22, Byron returned home from work around 4:30 p.m. and asked Niesha and another woman, who was pregnant with Quentin's child, to go to the liquor store to get beer and vodka. Later that evening, Byron, Quentin, Niesha, and the other woman hosted a small party at the home. At some point, all the men left the party. After they left, Fowler came over and asked if Byron was home. Niesha said "no" and asked Fowler to leave. Tr. Vol. 2 at 106. Fowler would not leave, and he "started hitting" Niesha and the other woman in the stomach with "a closed fist." *Id*. at 107, 108. Niesha could tell that

---

[1] Fowler was also convicted of two counts of battery, but he does not challenge those convictions on appeal.

Fowler was "drunk" or "on drugs." *Id*. at 107. She struck Fowler with a lampshade, and he finally left. The other woman called 911, and officers from the Indianapolis Metropolitan Police Department (IMPD) and an ambulance responded to the scene. IMPD Patrol Officer Michael Kasper spoke to the two women and then left to search the area for a black male matching Fowler's description. The ambulance also left the scene.

[4] Byron later walked up to the side yard of his house. Fowler saw him return and approached him saying, "You need to check your bitch." *Id*. at 110. Bryon replied, "That is my bitch." *Id*. Byron and Fowler engaged in a verbal argument, but neither of them threw any punches or touched one another. A group had gathered, including Quentin and Fowler's brother, Virgil, and they were trying to break up the argument and disperse the crowd. As some individuals were trying to pull Byron inside his house, Fowler shot him with a handgun and then fled through an alley.

[5] Officer Kasper received a dispatch to return to the homes on North Rural Street based upon a report of someone shot. When he arrived, he observed that Byron had been shot in the chest, and Virgil was there rendering aid. Once an ambulance removed Byron from the scene, officers began to search the neighborhood for Fowler. Byron later died.

[6] Officers found cartridge casings at the scene and also found two firearms, including a handgun, inside Fowler's mother's residence. Police determined

that at least one of the casings had been fired by the handgun and that bullet fragments recovered during Byron's autopsy matched the same handgun.

[7] On October 25, 2018, the State charged Fowler with murder and two counts of level 5 felony battery resulting in bodily injury to a pregnant woman. Fowler was eventually located and arrested in Alabama in December 2018. A two-day bench trial began on May 25, 2021. During trial, Fowler's sole theory was that he was acting in self-defense when he killed Byron. Following trial, the court found Fowler guilty of murder, level 5 felony battery resulting in bodily injury to a pregnant woman, and class A misdemeanor battery.[2]

[8] A sentencing hearing was held on July 14, 2021. At the conclusion of the hearing, Fowler made an oral motion for the trial court to reconsider its guilty verdict for murder and to enter judgment of conviction on the lesser included offense of voluntary manslaughter.[3] The trial court denied the motion. The court imposed the minimum sentence of forty-five years for murder and one year for each battery conviction. The court ordered the sentences to be served concurrently, for an aggregate sentence of forty-five years. This appeal ensued.

---

[2] The trial court concluded that insufficient evidence was presented that the second woman Fowler battered was pregnant, so the court found Fowler guilty of class A misdemeanor battery on that count.

[3] A person who knowingly or intentionally kills another human being, commits murder, a felony. Ind. Code § 35-42-1-1. A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a Level 2 felony. Ind. Code § 35-42-1-3. Voluntary manslaughter is an inherently included lesser offense of murder, distinguished from murder by the presence of sudden heat. *Wilson v. State*, 697 N.E.2d 466, 474 (Ind. 1998).

Discussion and Decision

[9] Fowler contends that the trial court erred in denying his oral motion, made at the conclusion of the sentencing hearing, to reconsider its guilty verdict for murder and to enter judgment of conviction for voluntary manslaughter. We begin by noting that, in denying Fowler's motion to reconsider, the trial court mistakenly stated that a self-defense claim and a voluntary manslaughter claim are mutually exclusive with regard to a murder charge and that these alternative theories are not permitted.[4] "The law in Indiana is clear … that a defendant in a murder trial may claim both self-defense and, alternatively, seek a conviction for voluntary manslaughter instead of murder." *Roberson v. State*, 982 N.E.2d 452, 456 (Ind. Ct. App. 2013) (citing *Clark v. State*, 834 N.E.2d 153, 158 (Ind. Ct. App. 2005)). Indeed, claims of self-defense and killing in sudden heat are not inherently inconsistent and, in appropriate circumstances, juries may be instructed on both. *Brantley v. State*, 91 N.E.3d 566, 573 (Ind. 2018) (citing *Pinegar v. State*, 553 N.E.2d 525, 528 (Ind. Ct. App. 1990) (finding self-defense and sudden heat are not "necessarily inconsistent" and a "jury should be allowed to determine the elements of self defense and whether there was adequate provocation and, in fact, killing in a sudden heat"), *cert. denied* (2019). The State concedes this point.

[10] Thus, unquestionably, during trial, defense counsel could have asked the trial court to find Fowler not guilty of murder based on self-defense or, in the

[4] The deputy prosecutor also made this same misstatement of the law.

alternative, guilty of voluntary manslaughter based on sudden heat. But this is not what happened. Instead, the trial court considered the sole claim raised by Fowler during the bench trial, that being self-defense, and determined that the evidence did not support his claim. Although voluntary manslaughter is a lesser included offense of murder, it is not a "typical" lesser included offense, because instead of requiring the State to prove less than all the elements of murder, it requires the State to prove all the elements of murder and disprove the existence of sudden heat beyond a reasonable doubt when there is any appreciable evidence of such in the record. *Watts v. State*, 885 N.E.2d 1228, 1232 (Ind. 2008). Sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. *Brantley v. State*, 91 N.E.3d 566, 571 (Ind. 2018). Existence of sudden heat is a classic question of fact to be determined by the trier of fact. *Boone v. State*, 728 N.E.2d 135, 139 (Ind. 2000).

[11] Here, had Fowler requested consideration of voluntary manslaughter during or at the conclusion of the bench trial, the trial court would have been in a position to determine whether there was appreciable evidence of sudden heat presented and, if so, to then determine if the State had met its burden to disprove the existence of sudden heat beyond a reasonable doubt.[5] However, Fowler never hinted at the existence of sudden heat or the possibility of a voluntary manslaughter conviction during trial. Moreover, if Fowler had claimed that he

[5] We note that trial counsel's choice to argue only self-defense was not an unreasonable trial strategy. *See Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) (recognizing that employing an "all or nothing" trial strategy is not ineffective assistance of counsel).

killed Byron due to sudden heat, the State would have been entitled to submit evidence that tended to rebut that claim. *See id.* ("In light of Boone's decision to defend herself by claiming the killing occurred due to the heat of the moment, the State was entitled to submit evidence that tended to show that Boone's intent to inflict fatal harm was one of longer standing."). Instead, the State was deprived of the opportunity to submit evidence, or even any argument, to show that Fowler, in fact, did not act in sudden heat.

[12] In short, by waiting until sentencing, which occurred almost two months after trial, to inject sudden heat as a mitigating factor to his killing of Byron, Fowler not only prejudiced the State, but also deprived the trial court, as factfinder, of the ability to properly exercise its factfinding function on that issue.[6] Under the circumstances, we conclude that the trial court did not err in denying Fowler's motion to reconsider and we affirm his convictions.

[13] Affirmed.

Bradford, C.J., and Tavitas, J., concur.

---

[6] Noting the untimeliness of Fowler's request, the trial court explained:

> I waited till the very end [of the bench trial] to decide that he was guilty as charged of murder. I don't know if I was thinking about voluntary manslaughter or not. Certainly, I was thinking about self-defense and found that the defense wasn't satisfied. If I could've or should've thought of voluntary [manslaughter], then we might be in a different position here. Further, I'm not sure I can change the verdict I entered based on a reinterpretation of the evidence and the argument that was earlier presented ….

Tr. Vol. 3 at 85-86.