

STATEMENT OF THE CASE

Brice Webb appeals his conviction for murder following a jury trial. He presents the following issues for review:

1. Whether the trial court erred when it allowed the State to charge Webb as an habitual offender beyond the statutory period allowed for amending charges.
2. Whether the trial court abused its discretion when it admitted into evidence a videotape of Webb's interrogation by police but failed to give the jury a preliminary or final limiting instruction on that evidence.
3. Whether the trial court erred when it refused to instruct the jury on the lesser included charge of reckless homicide.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 8, 2009, Webb shared an apartment with his girlfriend, Cherlyn Reyes. While their friends Shane Hillebrand and Ashley Gurrister were visiting the apartment that evening, the four watched a movie and drank beer and tequila. Gurrister also showed the others a handgun that she had recently purchased. The four friends played with the gun, firing it into the air outside and posing for photos with it. Gurrister always made sure there was not a bullet in the chamber each time she returned the gun to her purse.

Shortly before nine o'clock, Webb passed out, and Reyes and Gurrister left to visit a friend. When the women returned, Reyes looked through Webb's phone and found that he had been talking to another woman. "Cherlyn woke him up with a smack across the face[,]” and a verbal and physical fight ensued between the couple. Trial Transcript at

353. Webb eventually punched Reyes in the jaw, knocking her briefly unconscious. Hillebrand and Gurrister repeatedly worked to break up the fight.

After Reyes and Webb settled down, Reyes went in the bathroom and telephoned the woman with whom Webb had been talking on his phone. Webb followed her into the bathroom. When the couple began arguing again, Hillebrand and Gurrister once more broke up the fight.

Later in the evening, shortly before midnight, Reyes went to the bathroom to phone a friend, Jessica Hoover. During the call, Webb entered the bathroom and then went to the living room, where he asked Hillebrand for a light for his cigarette. While in the living room, Webb took the gun from Gurrister's purse and returned to the bathroom. While Reyes was still on the phone with Hoover, Webb began shouting, and Reyes got quiet. Reyes then said "Brice no," and Webb shot her in the head. Trial Transcript at 179.

The phone connection between Reyes' phone and Hoover was still live. Hoover heard Webb "screaming in the background, 'Cherlyn, baby, wake up, wake up.'" Id. She also heard a woman say, "Cherlyn, girl, it's going to be all right, wake up, wake up, it's going to be all right." Id. at 179-80. Hoover immediately called emergency dispatch and asked for someone to check on Reyes.

After hearing the shot, Hillebrand and Gurrister headed toward the bathroom. They met Webb in an adjacent room, where he said, "I just shot my baby's momma." Id. at 371. Hillebrand took the gun from Webb and told Gurrister to get him out of the apartment. After Gurrister left to take Webb to the home Hillebrand shared with his

fiancée, Hillebrand called the police. When Webb arrived at the fiancée's home, he woke her and told her that he had shot his "baby momma." Id. at 416.

Officer Brian Meador of the South Bend Police Department was dispatched to Webb's apartment. When he arrived, he found Hillebrand standing outside and the gun sitting on the front porch step. Officer Meador sent some officers to the home of Hillebrand's fiancée to pick up Webb. When those officers picked him up, they put him in the back of a police car without first taking Webb's cell phone. While in the back seat, Webb communicated with Hillebrand via cell phone and asked whether Hillebrand had told on him. Aware of these communications, Officer Meador contacted the officers in the police car and asked whether they had the right man in the car, because Webb was using his cell phone to contact Hillebrand. Corporal Timothy Wiley then confiscated Webb's phone.

Police officers transported Webb to the Metro Homicide Unit where officers videotaped an interview with Webb. In the interview, Webb claimed that he had left the apartment to buy cigarettes at a gas station and that Reyes had already been shot when he returned. When officer later told Webb that the gas station in question had been closed at the time, Webb said he had tried to buy cigarettes.

On October 9, the State charged Webb with murder. While Webb was incarcerated, he told a fellow inmate that he had been arguing with his girlfriend when he shot her in the head. Webb asked the inmate how to get his charge reduced to a lesser charge.

On February 9, the trial court granted Webb's motion to continue the February 23 trial date. The court also reset the record date.¹ On March 5, 2010, the State filed an information alleging Webb to be an habitual offender. At a hearing on April 27, the new record date, Webb pleaded not guilty to the habitual offender count and argued that the State's filing of the habitual offender count was not timely. The trial court ruled that the State had timely filed that count.

A jury trial was held May 17 through 21, 2010. Following deliberations, the jury found Webb guilty of murder. The court then informed the jury of the habitual offender charge, and the parties presented evidence on that count. The jury found Webb to be an habitual offender. The trial court sentenced Webb to sixty-five years for murder and thirty years on the habitual offender count, for a total of ninety-five years. Webb now appeals.

DISCUSSION AND DECISION

Issue One: Belated Habitual Offender Charge

Webb first contends that the trial court erred when it allowed the State to file the habitual offender information beyond the statutory deadline set in Indiana Code Section 35-34-1-5(e). The statute provides, in relevant part:

(e) An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8, IC 35-50-2-8.5, or IC 35-50-2-10 must be made not later than ten (10) days after the omnibus date. However, upon

¹ The record does not disclose the meaning of the "record date." However, Local Criminal Rules for St. Joseph County Rule LR71-CR00-307.1 provides:

In all criminal prosecutions, the Judge may assign a date that will serve as the plea bargain deadline date. The Judge may also assign a record date, trial date, and other dates as may be appropriate. If the parties have not reached a plea agreement by the omnibus date, the court may hold a pre-trial conference as early as that day.

a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial.

Id. (emphasis added). Webb asserts that the State failed to offer good cause for filing the charge after the omnibus date and that he is “always prejudiced by adding counts close to the date of trial, unless established otherwise.” Appellant’s Brief at 6. We cannot agree.

First, Webb incorrectly asserts that the State did not show good cause for filing the habitual offender count after the omnibus date. The omnibus date was December 22, 2009, the original record date was February 9, 2010, and trial was originally set for February 23. At a hearing on February 9, Webb took issue with the State’s recent statement that it might file unidentified additional charges if the ongoing plea negotiations were unsuccessful. The trial court indicated at that time: “We’ll probably need a hearing because I need to establish to my satisfaction that in fact the State told you [Webb] when you’re in possible plea discussions that they may file additional charges, I need to know when they told you.” February 9, 2010, Transcript at 7.

On February 9, Webb requested a continuance of the trial date. The trial court reset the trial to May 10, 2010. Then, on March 5, 2010, the State filed the habitual offender charge. At a hearing on April 27, the reset record date Webb raised the issue of whether the trial court should have allowed the State to belatedly file the habitual offender charge without a hearing:

Court: But you asked for a continuance and they made an offer but they said but guess what, here’s the offer, we’re going to be filing a habitual [offender charge] if we got to be going to trial[. Is] that sort of it?

[Defense counsel]: The omnibus date was December 22nd. Mr. Gabrielse [the State] said that they were looking at their case about what they were going to do. The Christmas holidays were in there. He said he was going

to be sending me a letter with an offer in it. January 11th the letter actually came out. It said here is the [plea] offer; we intend to file a thing [additional charge] if it's not accepted by the record date.

Just before the [February 9, 2010,] record date I said I had problems with going to trial. I said I was going to ask for a continuance, would the offer remain open until I've had additional time to talk to and go over some things with Mr. Webb. The State indicated [‘we will do that.‘] I filed a paper that basically said that, saying that we would not object to their filing if they filed it later than the record date.

When we did that, you raised the issue, and they filed it

April 27, 2010, Transcript at 8-9.

Again, on appeal Webb argues only, and briefly, that “the State never offered any ‘good cause’ justification for filing the [h]abitual [o]ffender [c]ount late, and never established that [Webb] was not prejudiced by the late filing.” Appellant’s Brief at 6. But the exchange quoted above from the April 27 hearing defeats Webb’s claim. At that hearing, Webb acknowledged that he had been in plea negotiations with the State since January. He even filed “a paper” saying that he “would not object to their filing [of the habitual offender charge] if they filed it later than the record date.”² April 27, 2010, Transcript at 9. Webb cannot now disclaim knowledge that the State intended to belatedly file that charge or retract his express waiver of an objection to the timing of that filing. In any event, we have held that continuing plea negotiations constitute good cause for filing a new charge outside the time limit under Section 35-34-1-5(3). See Falls v. State, 797 N.E.2d 316, 318-19 (Ind. Ct. App. 2003), trans. denied.

Webb also asserts that he suffered prejudice from the late filing of the habitual offender charge. But, armed in advance with the knowledge that the State intended to file

² Neither Webb nor the State has included in the record on appeal a copy of the “paper” Webb refers to here.

the additional charge outside the statutory time limit, and having given permission for the State to do so, Webb cannot now claim that he was prejudiced by the late filing. See id. Webb's contention that the trial court abused its discretion by allowing the untimely filing of the habitual offender charge is without merit.

Issue Two: Admission of Police Interview Videotape

Webb next contends that the trial court abused its discretion when it admitted into evidence a videotape of his October 9 police interview.³ Our standard of review of a trial court's findings as to the admissibility of evidence is an abuse of discretion. Roush v. State, 875 N.E.2d 801, 808 (Ind. Ct. App. 2008). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

Police videotaped their interview of Webb at the police station after he was taken into custody on the night of the murder. Webb contends that the videotaped police interview should not have been admitted because "the statements of officers conducting the interrogation were prejudicial, and that prejudicial impact outweighed the probative value." Appellant's Brief at 6. He also argues that the statements police attributed to third parties constituted inadmissible hearsay. Finally, he maintains that "any limiting [i]nstruction is insufficient to overcome the prejudice created by" the hearsay statements. Id. at 7. We disagree with Webb's contentions.

³ Our review of the transcript shows that the State was prepared to offer into evidence either an unredacted or a redacted videotape of Webb's police interview. The parties do not describe the nature of the redactions, but Webb's argument on appeal is based on the admission of the redacted videotape, which contains both police statements or questions as well as Webb's responses.

Webb argues only that statements by police on the videotape, not his own statements, are inadmissible. In essence, then, his argument is based on evidence that is admissible in one sense and inadmissible in another. Evidence Rule 105, which applies in such instances, provides: “When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly.” Our supreme court has explained the meaning of this rule:

The Indiana version of Rule 105 is apparently the only in the nation to use the term “admonish” rather than “instruct.” Cf., e.g., Fed. R. Evid. 105. Judge Miller has opined that the distinction is intended to enable a party to request a limiting admonition at the time the evidence is offered, rather than waiting until the jury instructions. 12 R. Miller, Indiana Practice § 105.104 at 109-10 (2d. ed. 1995). Thus, a limiting admonition under Rule 105 (usually during trial) is to be distinguished from a limiting instruction (usually after evidence has been presented). Id., see also Ind. Crim. Rule 8; Ind. Trial Rule 51(C) (outlining requirements for preserving challenge to a jury instruction).

Humphrey v. State, 680 N.E.2d 836, 839 n.7 (Ind. 1997); see also Martin v. State, 736 N.E.2d 1213, 1218 n.8 (Ind. 2000). “Rule 105 does not preclude trial courts from giving a limiting admonition or instruction sua sponte as a matter of discretion,¹ but by its plain terms imposes no affirmative duty to do so.” Humphrey, 680 N.E.2d at 839. And statements made by police officers in the course of an interrogation are admissible at trial if the court gives an appropriate limiting instruction regarding the jury’s treatment of those statements. See Washington v. State, 808 N.E.2d 617, 624-25 (Ind. 2004) (“although a trial court has no affirmative duty to consider giving an admonishment in the absence of a party’s request, it is error to admit statements by an interrogating officer without any limiting instruction or admonishment.”).

Here, the trial court admitted the videotaped interrogation over Webb's objection. Prior to playing the videotape for the jury, the trial court gave the following admonishment:

I need to caution you that during the interview with the defendant, the police officers made various statements and allegations. While those statements and allegations are legitimate and legally permissible during an interview, they are not evidence and are not to be considered by you as evidence. The statements, opinions, questions, and conduct of the officers participating in the interrogation of the defendant are hearsay and are being admitted for a limited purpose. They are being admitted to provide context for any statements made by the defendant. Those statements, opinions, questions, or conduct of the officers may not be considered as substantive evidence to establish any facts expressed by them. Only the statements of the defendant are evidence.

You may only consider the police officers' statements and allegations to help you understand the defendant's responses in their context.

And further, just as other forms of evidence introduced during trial, the evidence on recordings of interviews must conform to the [R]ules of [E]vidence. And because of that, there may be times when you might notice effects of an editing process when the recording is played in court. You're not to consider any such technical imperfections or any of the editing process. Only the evidence actually presented to you, namely the defendant's statements during the interview, should be considered.

Trial Transcript at 562-63.

The trial court's admonishment adequately addressed the basis of Webb's objection and correctly instructed the jury accordingly on what it could consider as evidence. With that admonishment, the trial court did not abuse its discretion when it admitted the videotape of Webb's police interview.

Issue Three: Lesser Included Jury Instruction

Finally, Webb contends that the trial court erred when it refused to instruct the jury on reckless homicide as a lesser included offense to murder. The manner of instructing a jury is left to the sound discretion of the trial court Patton v. State, 837 N.E.2d 576, 579 (Ind. Ct. App. 2005). Its ruling will not be reversed unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. Id. Jury instructions must be considered as a whole and in reference to each other. Id.

Trial courts should perform a three-part test when called upon by a party to instruct a jury on a lesser included offense of the crime charged. Fisher v. State, 810 N.E.2d 674, 678 (Ind. 2004). First, the trial court must compare the statute defining the crime charged with the statute defining the alleged lesser-included offense to determine if the alleged lesser included offense is inherently included in the crime charged. Id. Second, if a trial court determines that an alleged lesser included offense is not inherently included in the crime charged under step one, then it must determine if the alleged lesser included offense is factually included in the crime charged. Id. If the alleged lesser included offense is neither inherently nor factually included in the crime charged, the trial court should not give an instruction on the alleged lesser included offense. Id. Third, if a trial court has determined that an alleged lesser included offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case by both parties to determine if there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if, in view of this dispute,

a jury could conclude that the lesser offense was committed but not the greater. Id. “[I]t is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense” if there is such an evidentiary dispute. Id.

A person commits murder when he knowingly or intentionally kills another human being. Ind. Code § 35-42-1-1(1). A person commits reckless homicide, a Class C felony, when he recklessly kills another human being. Ind. Code. § 35-42-1-5. The level of culpability distinguishes murder from reckless homicide. Mitchell v. State, 541 N.E.2d 265, 270 (1989).

Here, Webb takes issue only with the trial court’s determination that there was no serious evidentiary dispute. In fact, the trial court found that there was a serious evidentiary dispute but that it was not about the element that distinguishes murder from reckless homicide. Again, the element that distinguishes the two offenses is the level of culpability. Id. But at trial and on appeal, Webb has maintained that he was not the shooter and was not even present when Reyes was shot. Thus, the fact in dispute is the identity of the shooter. Because the evidentiary dispute does not distinguish the greater from the lesser offense, the trial court did not err when it refused to instruct the jury on the lesser included offense of reckless homicide. See Fisher, 810 N.E.2d at 678.

Still, Webb contends that, once the jury believed he was the shooter, “they should [have been] free to determine whether the shooting was knowingly or recklessly done.” Appellant’s Brief at 9. He argues further that “to rule as the [trial] court did is to penalize [Webb] for testifying.” Id. We cannot agree. Webb steadfastly maintained at trial that he was not the shooter and was not even present when Reyes was shot. Thus, he has not

satisfied the third prong of the test. His argument that the jury should have been allowed to consider his culpability ignores that part of the test and flies in the face of the evidence admitted at trial. Webb's argument is without merit.

Affirmed.

ROBB, C.J., and CRONE, J., concur.