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Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

Court of Appeals of Indiana.

Brent SIMS, Appellant–Defendant,

v.

STATE of Indiana, Appellee–Plaintiff.

No. 82A01–1007–CR–328.
April 29, 2011.

Appeal from the Vanderburgh Circuit Court; The Honorable Kelly E. Fink, Judge/Magistrate; Cause No. 82C01–0902–MR–115.
Matthew J. McGovern, Evansville, IN, Attorney for Appellants.

Gregory F. Zoeller, Attorney General of Indiana, Brian Reitz, Deputy Attorney General, Indianapolis, IN, Attorneys for Appellee.

MEMORANDUM DECISION—NOT FOR PUBLICATION

BAKER, Judge.

*1 Appellant-defendant Brent Sims appeals his convictions for Murder, a felony,[FN1] and Neglect of a Dependent, a class D felony.[FN2] Specifically, Sims argues that the trial court erred in admitting his confession into evidence and in refusing to give his tendered voluntary manslaughter jury instruction. Sims also argues that his convictions violate the Double Jeopardy Clause of the Indiana Constitution. Concluding that the trial court did not err in admitting Sims's confession into evidence or in refusing to give his tendered voluntary manslaughter instruction, and that Sims's convictions do not violate the Indiana Double Jeopardy Clause, we affirm.

FN1. Ind.Code § 35–42–1–1.

FN2. Ind.Code § 35–46–1–4.

FACTS

T.H. was born on September 16, 2007. His mother, Janeen Crenshaw, met Sims in August 2008. In September 2008, Sims moved in with Crenshaw and T.H. Sims and Crenshaw were married in December 2008.

Three weeks after the wedding, on December 27, 2008, Crenshaw took T.H. to the emergency room to have doctors check the bruises on his legs. After waiting for several hours, Crenshaw left the hospital with T.H. before he saw a doctor. Crenshaw explained that she had to work the following day.

At approximately 3:30 p.m. on January 27, 2009, Sims drove Crenshaw to work at J.C. Penney. Less than three hours later, Sims arrived at J.C. Penney with a lifeless T.H. Crenshaw called 911, and several Evansville Police and Fire Department Officers arrived at the store. T.H. was motionless, had no pulse, and was not breathing. While some of the officers attempted to resuscitate him, other officers noticed an emotionless and distant Sims walking around the store talking on his cell phone while a distraught Crenshaw sobbed. T.H. was eventually transported to the hospital where he was pronounced dead.

Sims became concerned when a coroner arrived at the hospital. Specifically, Sims asked the coroner if there was going to be an autopsy and when it was going to be done. Later that night, after the coroner had left the hospital and taken T.H.'s body to the morgue, Sims contacted the coroner and asked him what was going to be done during the autopsy. The following day, Sims contacted the coroner several times to see whether the autopsy had been completed. Sims's behavior struck the coroner as unusual.

On January 28, 2009, Evansville Police Department Detective Tony Mayhew questioned Sims. During a videotaped statement, Sims initially told Detective Mayhew that he did not remember what happened. Sims subsequently told the detective that he was thinking about the rent being due, and a sick T.H. would not stop crying. Sims explained that he hit T.H. in the head with an open hand, and then hit him in the chest, arms, and legs with an open fist. Sims also grabbed T.H.'s feet and pinched them. When Sims later tried to rouse T.H., the toddler was "like a rag doll." Appellant's App. p. 179. Detective Mayhew asked Sims if he "lost control." *Id*. at 173. Sims responded that he did not. Rather, Sims explained that he knew where he was and what he was doing. *Id*.

*2 The State charged Sims with murder and neglect of a dependent resulting in death as a class A felony. At trial, Dr. Elmo Allen Griggs, the pathologist who performed T.H.'s autopsy, testified that an external examination of T.H. revealed evidence of multiple traumas to the body, including the chest and arms. Bruises on T.H.'s arms were consistent with someone grabbing him by the arms and shaking him. T.H. also had burns on the soles of his feet. An internal examination revealed traumatic injuries to the brain, neck, chest, and abdomen. In addition, T.H.'s spinal cord was damaged, his vertebrae were dislocated, his ribs were broken and dislocated, and his diaphragm and liver were bruised. The fatal injury was a subdural hematoma, an accumulation of blood on top of the brain under the skull. This type of injury is typically seen where a baby is shaken with the force that approaches the force seen in an automobile accident.

The trial court admitted Sims's confession to Detective Mayhew into evidence over Sims's objection. The trial court also refused to give Sims's tendered jury instruction on voluntary manslaughter. The jury convicted Sims as charged. However, the trial court reduced Sims's conviction of neglect of a dependent resulting in death from a class A felony to a class D felony. The trial court sentenced Sims to sixty years for murder and two years for neglect of a dependent, sentences to run concurrently. Sims appeals his convictions.

DISCUSSION AND DECISION

I. Admission of Confession

Sims first argues that the trial court erred in admitting his confession into evidence. Specifically, he contends that his confession was coerced in violation of his Fifth Amendment right against self-incrimination. In support of his contention, Sims directs us to the following comments made by Detective Mayhew during his questioning of Sims on January 28, 2009:

But ... don't be silly and lie about this I mean because even though you might be charged with one thing you know there's plea agreements and things they can work out a deal with you but don't throw away your entire life because that jury is going to be pi* *ed and that judge is gonna [be] pi* *ed if you go in lying in Court. They're gonna say [he] shows no remorse, he doesn't feel bad about what happened and whether you cry or not I mean that's not ... that's not what remorse is about. But doing the right thing here and telling the truth what happened that's ... that's what you need to do.

Appellant's App. at 182–83. According to Sims, "Detective Mayhew unequivocally informed him that if he told the truth the prosecutor would work out a deal for him. This Court and our Supreme Court have reversed defendants' convictions based upon identical circumstances [in *Ashby v. State,* 265 Ind. 316, 354 N.E.2d 102 (1976) and *McGhee v. State,* 899 N.E.2d 35 (Ind.Ct.App.2008).]" Appellant's Br. p. 10.

In *Ashby,* Ashby and co-defendant Corley were arrested on suspicion of inflicting injury during the course of a robbery, which carried a possible life sentence. During questioning, the men were told if they gave statements about their participation in the robbery, they would be allowed to plead guilty to armed robbery in exchange for a ten-year sentence. The men accepted the offer and confessed to the crime. Notwithstanding the agreement, the State took the case to trial, admitted the oral confessions into evidence, and obtained life sentences for both men. *Id.* at 317. On appeal, the Indiana Supreme Court concluded that the defendants' confessions were coerced and inadmissible because they were brought about by the officer's misrepresentation that the defendants' punishment would be mitigated. *Id.* at 322.

*3 Similarly, during questioning in *McGhee,* an officer told McGhee that it was not illegal for an uncle to have sexual intercourse with his niece "if she wanted it." *McGhee,* 899 N.E.2d at 37. Immediately thereafter, McGhee told the officer that his twenty-five-year-old niece had come into the bedroom drunk and naked and initiated a sexual encounter. The State subsequently charged McGhee with incest. The trial court admitted McGhee's confession into evidence over McGhee's objection, and McGhee was convicted. On appeal, this court concluded that McGhee's confession was brought about by the officer's misstatement of the law and was therefore involuntary and inadmissible. *Id.* at 39.

Here, however, Detective Mayhew neither promised Sims his punishment would be mitigated nor misstated the law. Rather, the detective merely told Sims that it was in his best interest to be honest and tell the real story, and that plea agreements and deals were available. The Indiana Supreme Court has consistently held that vague and indefinite statements by the police about it being in the best interest of the defendant for him to tell the real story or cooperate with the police, such as the one in this case, are not sufficient inducements to render a subsequent confession inadmissible. *Massey v. State,* 473 N.E.2d 146, 148 (Ind.1985). Sims's confession was not coerced, and the trial court did not err in admitting it into evidence.

II. Refusal to Give Tendered Voluntary Manslaughter Jury Instruction

Sims next argues that the trial court erred when it found insufficient evidence of sudden heat and refused to give Sims's following tendered instruction on voluntary manslaughter:

The crime of murder is defined by law as follows:

A person who knowingly or intentionally kills another human being, commits murder, a felony.

Included in the charge in this case is the crime of voluntary manslaughter, which is defined by statute as follows:

A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a Class B felony.

Sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter. The State has the burden of proving beyond a reasonable doubt that the Defendant was not acting under sudden heat.

Appellant's App. p. 143. According to Sims, there is a serious evidentiary dispute as to whether he acted under sudden heat.

Where the trial court rejects a voluntary manslaughter instruction based on a lack of evidence of sudden heat, we review the trial court's decision for an abuse of discretion. *Suprenant v.. State*, 925 N.E.2d 1280, 1283 (Ind.Ct.App.2010), *trans. denied*. In *Wright v. State*, 658 N.E.2d 563 (Ind.1995), the Indiana Supreme Court set forth the proper analysis to determine when a trial court should, upon request, instruct the jury on a lesser included offense of the crime charged. The analysis contains three steps: 1) a determination of whether the lesser included offense is inherently included in the crime charged; if not, 2) a determination of whether the lesser included offense is factually included in the crime charged; and, if either, 3) a determination of whether a serious evidentiary dispute existed whereby the jury could conclude that the lesser offense was committed but not the greater. *Horan v. State*, 682 N.E.2d 502, 506 (Ind.1997). If the third step is reached and answered in the affirmative, the requested instruction should be given. *Id*.

*4 Voluntary manslaughter is a lesser included offense of murder. *Id*. We therefore turn to step three of the *Wright* analysis to determine whether Sims's proposed instruction should have been given. *See id*.

The crime of voluntary manslaughter is distinguishable from murder by the presence of the mitigating factor of sudden heat. *Powers v. State*, 696 N.E.2d 865, 868 (Ind.1998). A trial court should grant the requested voluntary manslaughter instruction if the evidence demonstrates a serious evidentiary dispute regarding the presence of sudden heat. *Id*. To establish sudden heat, the defendant must show sufficient provocation to engender passion. *Id*. Sufficient provocation is demonstrated by "such emotions as anger, rage, sudden resentment, or terror sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection ." *Johnson v. State*, 518 N.E.2d 1073, 1077 (Ind.1988).

Here, Sims argues that "impending financial collapse and hearing a child cry unabated should be considered, in combination, emotion 'sufficient to obscure the reason of an ordinary man.' " Appellant's Br. p. 16. However, this court has previously explained that a crying child does not constitute the provocation necessary to qualify the defendant's actions as sudden heat. *Book v. State*, 880 N.E.2d 1240, 1253 (Ind.Ct.App.2008) (quoting *Powers*, 696 N.E.2d at 868). And this Court is certainly not prepared to say that a financial hardship coupled with a crying child is sufficient provocation to warrant an instruction on voluntary manslaughter. Indeed, many Hoosiers face these challenges daily.

We further note that Sims told Detective Mayhew that he did not lose control, and that he knew where he was and what he was doing. This evidence does not support an inference that Sims acted under sudden heat. Accordingly, the trial court did not err in refusing to give Sims's tendered voluntary manslaughter instruction as a lesser included offense of murder.

III. Double Jeopardy

The jury convicted Sims of murder and neglect of a dependent as a class A felony. However, the trial court reduced Sims's conviction of neglect of a dependent resulting in death from a class A felony to a class D felony. Sims argues that his convictions for murder and neglect of a dependent as a class D felony violate Indiana Double Jeopardy Clause.

Article I, Section 14 of the Indiana Constitution provides that "No person shall be put in jeopardy twice for the same offense." In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind.1999), the Indiana Supreme Court developed the following two-part test for Indiana double jeopardy claims:

[T]wo or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution., if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

*5 (emphasis in original).

Sims contends his convictions violate the actual evidence test. Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. *Lee v. State*, 892 N .E.2d 1231, 1234 (Ind.2008). To show that the two challenged offenses constitute the same offense in a claim of double jeopardy, a defendant must demonstrate a reasonable probability that the evidentiary facts used by the fact finder to establish the essential elements of one offense may also have been used to establish the essential elements of the second challenged offense. *Id*.

In *Spivey v. State*, 761 N.E.2d 831, 833 (Ind.2001), our Supreme Court further explained that the actual evidence test is not merely whether the evidentiary facts used to establish one of the essential elements of one offense may also have been used to establish one of the essential elements of a second challenged offense. Rather, the actual evidence test is not violated so long as each conviction requires proof of at least one unique evidentiary fact. *Bald v. State*, 766 N.E.2d 1170, 1172 (Ind.2002). Thus, even if each charge utilizes the same factual event, no constitutional violation will be found if the second offense requires additional evidentiary facts establishing the essential elements. *Vandergriff v. State*, 812 N.E.2d 1084, 1086–87 (Ind.Ct.App.2004).

Application of the test requires the court to identify the essential elements of each of the challenged offenses and to evaluate the evidence from the jury's perspective. *Spivey*, 761 N.E.2d at 832. In determining the facts used by the fact finder to establish the elements of each offense, it is appropriate to consider the charging information, jury instructions, and arguments of counsel. *Id*.

Here, Sims was convicted of murder and neglect of a dependent as a class D felony. For the murder conviction, the State was required to establish that Sims knowingly or intentionally killed T.H. For the neglect of a dependent conviction, the State had to establish that Sims had the care of T.H., whether assumed voluntarily or because of a legal obligation, and that Sims knowingly or intentionally placed T.H. in a situation that endangered T.H.'s life or health.

The evidence presented at trial revealed that on January 27, 2009, while T.H. was in Sims's care, Sims hit T.H. in the head with an open hand, and then hit him in the chest, arms, and legs with an open fist. Sims also pinched T.H.'s feet. As a result of Sims's actions, T.H.'s spinal cord was damaged, his vertebrae were dislocated, his ribs were broken and dislocated, and his diaphragm and liver were bruised. T.H. also suffered a fatal subdural hematoma.

These facts can properly support both convictions. Murder is supported by T.H's death as the result of the subdural hematoma, and neglect of a dependent is supported by Sims punching T.H. in the chest, arms, and legs with an open fist, which knowingly placed T.H. in a situation that endangered his life or health. We therefore find no Indiana Double Jeopardy violation. [FN3] *See Strong v. State*, 870 N.E.2d 442, 444 (Ind.2007) (holding that defendant's convictions for murder and neglect of a dependent as a class D felony did not violate double jeopardy).

FN3. Sims's reliance on *Roby v. State*, 742 N.E.2d 505 (Ind.2001), is misplaced. There, the Indiana Supreme Court determined that convictions for knowingly killing a child and neglect of a dependant as a class B felony constituted a double jeopardy violation because there was a reasonable probability that the jury used the same evidence to establish the knowing killing of the child and the serious bodily injury of the neglect charge. *Id*. at 509. However, *Roby* was decided before *Spivey v. State*, 761 N.E.2d 831 (Ind.2002), which clarified the actual evidence test. *Vandergriff*, 812 N.E.2d at 1088, n. 6. We find no error.

*6 The judgment of the trial court is affirmed.

MAY, J., and BRADFORD, J., concur.

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Briefs and Other Related Documents (Back to top)

• 2011 WL 1463403 (Appellate Brief) Brief of Appellee (Mar. 1, 2011) Original Image of this Document (PDF)
• 2011 WL 1463402 (Appellate Brief) Brief of Appellant (Jan. 27, 2011)
• 82-A-01-1007-CR-00328 (Docket) (Jul. 14, 2010)
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