

**IN THE
INDIANA COURT OF APPEALS**

CAUSE NO. 24A-CR-00909

AJAYLAN M. SHABAZZ)	Appeal from the Allen Superior Court
Appellant)	
)	
vs.)	Trial Court Cause No. 02D06-2111-MR-000020
)	
STATE OF INDIANA)	
Appellee)	Honorable David M. Zent, Judge

BRIEF OF APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- 1) Whether the trial court erred in permitting a State's witness to testify via Zoom from an Indiana Department of Correction facility?
- 2) Whether the trial court abused its discretion when it admitted evidence pursuant to Indiana Rule 404(b)(2)?
- 3) Whether the trial court erred in denying the defense's request for a jury instruction on assisting a criminal as a Level 5 felony?
- 4) Whether the trial court erred in prohibiting defense counsel in his closing argument from arguing that the State failed to prove that Shabazz committed the murder, but may have proven that he had committed a lesser offense instead?
- 5) Whether the trial court erred in allowing the State to inform the jury that a co-participant, Ariona Darling, was deceased, yet prevented the defense from informing the jury that her death was a suicide?
- 6) Whether the jury was properly instructed on the crime charged considering the draftsmanship of the charging Information coupled with the jury's instructions given in this case?
- 7) Whether sufficient evidence was presented to support Shabazz's conviction for murder?

STATEMENT OF CASE

On November 1, 2021, the State filed an Information which alleged that “... On or about May 10, 2021, Ajaylan M. Shabazz, while acting in concert with Terry Smith, Jr., and/or Ariona Darling, did knowingly or intentionally kill another human being, to-wit: Tiffany Ferris ...” (App. Vol. II p. 25-26. An Affidavit for Probable Cause was filed in support of the Information and a warrant was issued for the arrest of Mr. Shabazz. (App. Vol. II p. 22-24). Records show that the warrant was served the next day. (App. Vol. II p. 2).

On November 3, 2021, an Initial Hearing was held during which a preliminary plea of not guilty was entered, the Public Defender’s Office was appointed, and the matter was set for November 17, 2021, for counsel to appear and select a trial date. (App. Vol. II p. 27).

On November 15, 2021, Deputy Public Defender Robert Scremin filed an appearance on behalf of Mr. Shabazz. (App. Vol. II p. 28-29). On November 2, 2021, Deputy Prosecuting Attorney Tesa Helge filed an appearance on behalf of the State. (App. Vol. II p. 32). Chief Deputy Prosecutor Thomas D. Chaille would file his appearance at a later date as co-counsel. (App. Vol. II p. 71). On November 17, 2021, a hearing was held during which Mr. Shabazz requested the early trial and the matter was set for November 29, 2021, so that a speedy trial date could be selected. (App. Vol. II p. 4). On November 24, the State filed a Notice of 404. (App. Vol. II p. 37-47).

On November 29, 2021, a speedy trial date was scheduled to commence on February 22, 2022, before the Honorable David M. Zent. A pretrial conference was scheduled for January 11, 2022. (App. Vol. II p. 48). A hearing on the State’s 404B motion was also scheduled for

January 11. (App. Vol. II p. 49). Due to Mr. Scremin's unavailability, the pretrial conference was continued to January 21, 2022. (App. Vol. II p. 52).

On January 21, 2022, the pretrial conference was held, as well as the 404B hearing which was taken under advisement. (App. Vol. II p. 55). On January 26, 2022, the defense filed a motion to continue which motion included a waiver of Shabazz's request for a speedy trial. (App. Vol. II p. 56). On January 28, 2022, the trial was continued and the court scheduled the matter for February 4, 2022, for the setting of a new trial. (App. Vol. II p. 57). On February 1, 2022, the trial court issued an order granting the State's 404B motion. (App. Vol. II p. 58). On February 4, 2022, the jury trial was rescheduled to commence on May 31, 2022, with a pretrial conference set for April 18, 2022. (App. Vol. II p. 59).

On April 18, 2022, a pretrial conference was held. (App. Vol. II p. 64). However, on May 27, 2022, Ajaylan Shabazz entered a guilty plea, pursuant to a plea agreement, to Count II, Aggravated Battery, and the matter was set for sentencing on July 15, 2022. (App. Vol. II p. 90-92). In order to satisfy the terms of the plea agreement, the sentencing was continued to October 14, 2022. (App. Vol. II p. 120). However, on October 31, 2022, the defense filed a Motion to Withdraw Plea. (App. Vol. II p. 121-123). On October 31, 2022, the court granted the motion and, ultimately, the jury trial was rescheduled to commence on April 25, 2023. (App. Vol. II p. 124-125).

On November 2, 2022, the State filed a Motion for Joinder (with a case filed against Terry Smith). (App. Vol. II p. 126-128). The motion was granted without objection. (App. Vol. II p. 129). On April 20, 2023, the defense filed a motion to continue citing that on April 19,

2023, Terry Smith accepted a plea agreement wherein Smith agreed to testify against Shabazz. (App. Vol. II p. 138-139). The motion was granted and the trial was rescheduled to commence on October 24, 2023. (App. Vol. II p. 140). However, due to court congestion, this trial date was continued to commence on February 12, 2024. (App. Vol. II p. 144).

On February 12, 2024, the jury trial commenced. Preliminary matters were resolved which included the dismissal of Count II, issues related to the State's motions in limine, the separation of witnesses, and whether a witness would be allowed to testify via Zoom. (App. Vol. II p. 157; Tr. Vol. 1 p. 4-18). Voir dire was conducted, including mini opening statements, and a jury was selected and sworn. (App. Vol. II p. 157; Tr. Vol. 1 p. 19-113). Preliminary instructions were given and counsel made opening statements. The State commenced the presentation of its case-in-chief. The trial was recessed for the day, the jury was admonished, and the trial was set to reconvene February 13, 2024. (App. Vol. II p. 148-157; Tr. Vol. 1 p. 114-173).

On February 13, 2024, the jury trial resumed with the State continuing the presentation of its case-in-chief. (App. Vol. II p. 158; Tr. Vol. 1 p. 174-250, Vol. 2 p. 2-104). On February 14, 2024, the jury trial continued. The State completed the presentation of its case-in-chief and rested. (App. Vol. II p. 159; Tr. Vol. 2 p. 106-179). The defense presented its case-in-chief and rested. (App. Vol. II p. 159; Tr. Vol. 2 p. 179-215). Outside the presence of the jury, court and counsel resolved the issue of final jury instructions. The trial was recessed for the day and was scheduled to recommence on February 16, 2024. (App. Vol. II p. 159; Tr. Vol. 2 p. 215-226).

On February 16, 2024, the jury trial resumed with the judge reading the jury case specific instructions to the jury. (App. Vol. II p. 160-174, 181; Tr. Vol. 2 p. 227-228). Closing arguments were made, the court read the balance of final instructions, and the jury retired to deliberate. (App. Vol. II p. 175-179, 181; Tr. Vol. 2 p. 228-250; Vol. 3 p. 2-16). Upon deliberating over four hours, the jury returned a verdict of guilty. (App. Vol. II p. 180-181; Tr. Vol. 3 p. 16-18). The court entered judgment upon the verdict, referred the matter to probation for the preparation of a presentence investigation report, and scheduled sentencing for March 18, 2024. (App. Vol. II p. 181; Tr. Vol. 3 p. 18-19).

On March 18, 2024, the sentencing hearing was conducted. The court considered the arguments of counsel, the presentence investigation report, victim impact statements, and an allocution statement by Mr. Shabazz himself. (App. Vol. II p. 183-206; Tr. Vol. 3 p. 23-33). Thereafter, the court sentence Shabazz to sixty-three (63) years executed, ordered restitution in the amount of \$1,785.00, and awarded him five hundred thirty-six (536) days of jail time credit. The trial court advised Mr. Shabazz of his right to appeal and Shabazz indicated that he wished to do so. Accordingly, the court directed the Allen County Public Defender's Office to perfect the appeal. (App. Vol. II p. 207-209; Tr. Vol. 3 p. 33).

On April 10, 2024, Gregory L. Fumarolo filed his appearance at the trial level. (App. Vol. II p. 210-211). On April 17, 2024, the Notice of Appeal was timely filed. (App. Vol. II p. 212-214). On April 26, 2024, the Notice of Completion of Clerk's Record was filed which indicated that the transcript was not yet completed. (App. Vol. II p. 215-216). On May 21, 2024, the Notice of Completion of Transcript was filed, making June 20, 2024, the deadline for filing

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the Brief of Appellant. (App. Vol. II p. 217-218). However, on June 13, 2024, a Motion for Extension of Time to File Brief of Appellant was filed. (App. Vol. II p. 219-221). On June 17, 2024, the Court of Appeals granted this motion and extended the deadline to on or before July 22, 2024. (App. Vol. II p. 222). On July 19, 2024, an Emergency Motion for a Second Extension of Time to File Brief of Appellant was filed. (App. Vol. II p. 223-225). On July 20, 2024, the Court of Appeals granted this motion and extended the deadline to on or before August 21, 2024. (App. Vol. II p. 226).

Ajaylan Shabazz is presently incarcerated at the Pendleton Correctional Facility. His DOC number is 260957. The issues presented herein are respectfully submitted to the Indiana Court of Appeals for review and consideration.

STATEMENT OF FACTS

IN GENERAL

In the few weeks leading up to May 9, 2021, a group of homeless drug users expropriated Room 1078 of the Suburban Inn in Fort Wayne, Indiana, and used it as a haven to subsist outside the prying eyes of society. (Tr. Vol. 2 p. 133, 187-188; Vol. 3 p. 187-189). The room itself was not being rented, but was used to store things associated with the motel such as boxes, unused furniture, scaffolding, etc. (Tr. Vol. 2 p. 150, 160, 175). Although the door to the room was locked, the room was accessed by climbing through a window. The relevant individuals using Room 1078 were Tiffany Ferris, Dustin Blair, Ajaylan Shabazz, and Ariona Darling (sometimes referred to as “Ari”). (Tr. Vol. 2 p. 133-136, 141; Vol. 3 p. 187-189). Shabazz (also known as “Yop”) referred to Darling as his fiancé. (Tr. Vol. 2 p. 189; Vol. 3 p. 90).

Within walking distance of Room 1078 was a Shell gas station where Dustin Blair’s sister-in-law worked and where individuals in the group would go to purchase snacks and drinks to satisfy their day to day, hand to mouth existence. (Tr. Vol. 2 p. 136). The station would also serve as an outpost for those making contact with the outside world.

POV: DUSTIN BLAIR

Sometime in the evening of May 9, 2021, Ferris and Blair were in the storage room. Shabazz and Darling were at the Shell gas station. Blair described Ferris as “dope sick” suffering from a “fetty” (fentanyl) withdrawal. Blair himself was withdrawing from having used “Ice” (crystal methamphetamine). (Tr. Vol. 2 p. 135-136). At some point, Darling, Shabazz, and Terry Smith came in through the window. (Tr. Vol. 2 p. 134-135). Blair stated that he had

known Shabazz and Darling a short time, but had never met Smith. (Tr. Vol. 2 p. 134-135).

According to Blair, Tiffany was sleeping on the couch when he left the storage room. Blair went to the Shell station and spoke with his sister in law who allowed him to sleep in her car for the night. (Tr. Vol. 2 p. 136-137). Around 6 to 7 a.m. (now May 10, 2021), Blair awoke and returned to Room 1078. (Tr. Vol. 2 p. 137). There he found Tiffany Ferris dead in the bathtub. He did not see any bruises on her, but did see a needle next to the tub which he moved because he didn't want people thinking of her as a dope addict. (Tr. Vol. 2 p. 138-140). Blair went to the Shell station, the police were contacted, and Blair returned to the room to await the arrival of the authorities. (Tr. Vol. 2 p. 138-139).

In addition to cooperating with the police concerning the events of May 9 and 10, Blair also testified regarding a conversation he had with Shabazz when they were both inmates at the Allen County Jail in 2022. (Tr. Vol. 2 p. 145-146). During this alleged conversation, Blair said that Shabazz admitted that he killed Ferris and that Blair should keep his mouth shut or he could end up like her. (Tr. Vol. 2 p. 139-142). On cross examination, it was revealed that Blair was testifying pursuant to a plea deal that he had obtained from the State for an unrelated case. (Tr. Vol. 2 p. 141-145).

POV: THE AUTHORITIES

Officers Hill and Jester of the Fort Wayne Police Department responded to the scene and found Ms. Ferris dead and naked in the bathtub which was partially filled with water. (Tr. Vol. 2 p. 151-152, 161-162). Officer Hill noticed bruises on the body and redness around her nose and mouth. (Tr. Vol. 2 p. 152).

Dr. Kent Hershberger performed the autopsy which revealed that Ferris who was 4'10" tall and weighed 101 pounds, had sustained blunt force injuries, contusions, and injuries consistent with being held down and struck. (Tr. Vol. 3 p. 20-23, 31-32). Hershberger said that the death was a homicide and that the cause of death was "injuries consistent with drowning". (Tr. Vol. 3 p. 32-33).

It should also be noted that law enforcement determined that an individual named Amy Monhollan accompanied Terry Smith during these events. However, she did not enter Room 1078 or participate in items being removed from the room. Additionally, she did not participate in the related robbery nor did she testify at trial. (Tr. Vol. 1 p. 186, 218-219, 238).

POV: TERRY SMITH

Smith, a Bluffton, Indiana resident, had driven his F150 pickup to Fort Wayne that night and encountered Shabazz and Darling at the Shell station. Although they had never met, Smith acknowledged Shabazz as he got out of his truck and inquired as to the "availability" of Darling. (Tr. Vol. 2 p. 184-186; Vol. 3 p. 190-210). Shabazz told Smith she was spoken for and the conversation quickly turned to drugs. (Tr. Vol. 2 p. 184-186; Vol. 3 p. 190-191). The three then ventured to the storage room occupied at the time by Ferris and Blair. Smith told the jury that Shabazz had left the room and that trouble began when Darling accused Ferris of stealing drugs and began punching her. (Tr. Vol. 2 p. 189). According to Smith, Blair was still in the room at the time. The assault on Ferris continued. Shabazz came back to the room. According to Smith, at some point, Shabazz picked Ferris up and when doing so Ferris' head slammed into a dresser in the room. (Tr. Vol. 2 p. 191, 215). However on cross examination, Smith testified that he

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didn't see Shabazz smash Ferris' head into the dresser. (Tr. Vol. 2 p. 208-209). Smith said there was blood everywhere on the carpet. (Tr. Vol. 2 p. 192-193). Smith admitting helping Shabazz carry Ferris to the bathroom. (Tr. Vol. 2 p. 194). At some point, Smith saw Ferris naked in the tub. (Tr. Vol. 2 p. 195). Her eyes were closed and her head and face were bloody. (Tr. Vol. 2 p. 196). Smith further conceded that instead of leaving and contacting the authorities, he stayed and assisted Shabazz and Darling remove items from the room, put them in his truck, and take them to a dumpster at another nearby motel. (Tr. Vol. 2 p. 197-200). Smith also admitted to having a rifle and handgun in his truck. (Tr. Vol. 1 p. 206). Additionally, Smith admitted to participating in a robbery with Shabazz and Darling soon after throwing things in the dumpster. (Tr. Vol. 2 p. 201-202). Smith also admitted driving Shabazz and Darling to Indianapolis where they were arrested two days later. (Tr. Vol. 2 p. 202, 218-219).

Terry Smith also received a plea bargain for his role in Ferris' death. Specifically, Smith plead guilty to aggravated battery and would receive a 12 year executed sentence to provide testimony against Shabazz. During his testimony, Smith disavowed his guilty plea denying that he battered Ferris. (Tr. Vol. 1 p. 204-206).

POV: AJAYLAN SHABAZZ

Testifying in his own defense, Shabazz told the jury that he, along with Blair, Darling, Ferris, and Smith, were all in Room 1078. Shabazz stated that he left the room for a time. At some point, Darling contacted him and asked him to return. (Tr. Vol. 3 p. 192). When he did, Shabazz saw Smith stomping on Ferris. Shabazz testified he punched Smith, at which time Smith pulled a gun on Shabazz claiming Ferris stole "fetty". Shabazz stated that, at gun point, he

helped Smith carry Ferris to the bathroom and detailed what Smith did to Ferris, including hearing the sound of Smith drowning Ferris. (Tr. Vol. 3 p. 192-198, 201-203).

Shabazz admitted to perpetrating a robbery with Smith soon after the events in Room 1078 and that he left his shoes at the scene of the robbery and took a pair of the victim's shoes because they were better than the shoes he was wearing. (Tr. Vol. 3 p. 203-207). Shabazz also admitted that he and Darling accompanied Smith to Indianapolis where they were eventually arrested. (Tr. Vol. 3 p. 207).

Shabazz's shoes left at the robbery scene were of interest because Ferris' DNA was found to be on them. (Tr. Vol. 3 p. 164-167??). Shabazz explained that Ferris' DNA might have gotten on the shoes as he was assisting Smith, at gunpoint, carrying Ferris to the bathroom. (Tr. Vol. 3 p. 199).

ADDITIONAL FACTS

It should be noted here, that the State's use of the evidence of the robbery was allowed by the trial court over defense objection and is the subject of an argument set forth below. Further, over defense objection to testimony via Zoom, Miquan Jones testified from a Indiana Department of Correction facility. (Tr. Vol. 3 p. 105). Jones stated that while he and Shabazz were in the Allen County Jail, Shabazz admitted to Jones that he killed Ferris and that Shabazz threatened him. (Tr. Vol. 3 p. 107-108). Jones also obtained a plea bargain to testify against Shabazz wherein he would receive home detention for a unrelated crime. (Tr. Vol. 3 p. 109, 112). Prior to testifying, Jones was violated from home detention.

Additional facts will be provided as needed in the Argument section.

SUMMARY OF THE ARGUMENT

1) The trial court erred in permitting a State's witness to testify via Zoom from an Indiana Department of Correction facility.

Over defense objection, an inmate in the Indiana Department of Correction was allowed to testify for the State via Zoom. Shabazz contends that this violated his rights under Article 1 § 13 of the Indiana Constitution and the 6th Amendment to the Constitution of the United States. It also violated Interim Administrative Rule 14 which governs “remote proceedings” and good cause was not shown for allowing this testimony.

2) The trial court abused its discretion when it admitted evidence pursuant to Indiana Rule 404(b)(2).

Shabazz and others committed a robbery not long after the murder. During the robbery, Shabazz exchanged his shoes for the shoes of one of the robbery victims. Shabazz's shoes had the murder victim's DNA on them. The defense offered to stipulate to these facts, but the State insisted on presenting evidence of the robbery, in full, which the trial court allowed. Given the defense's offer, the prejudicial nature of the evidence, even if admissible under 404(b)(2) outweighed its probative value.

3) The trial court erred in denying the defense's request for a jury instruction on assisting a criminal as a Level 5 felony.

Shabazz contends that his request for a jury instruction on assisting a criminal, a Level 5 felony, should have been given as it met the definition of “included offense” as defined by I.C. 35-31.5-2-168. The court's refusal to give it was reversible error.

- 4) The trial court erred in prohibiting defense counsel in his closing argument from arguing that the State failed to prove that Shabazz committed the murder, but may have proven that he had committed a lesser offense instead.**

Even if the trial court correctly denied the instruction regarding the lesser included offense, it was reversible error to prevent Shabazz's lawyer from arguing that a lesser offense had been committed. *Dixey v. State*, 956 N.E.2d 776 (Ind.Ct.App. 2011). In effect, the trial court's ruling denied Shabazz his right to present a defense.

- 5) The trial court erred in allowing the State to inform the jury that a co-participant, Ariona Darling was deceased, but prevented the defense from informing the jury that her death was a suicide.**

To Shabazz's detriment, the State was allowed to tailor the narrative which allowed the jury to speculate as to the co-participant's death. If it was relevant to inform the jury that Ariona Darling was deceased, it was also relevant that her death was a suicide.

- 6) The jury was not properly instructed on the crime charged considering the draftsmanship of the charging Information coupled with the jury's instructions given in this case.**

The State charged Shabazz with murder "by acting in concert with" others. In instructing the jury, the trial court never defined this phrase. It did instruct the jury on accomplice liability, but did not indicate whether accomplice liability was synonymous with acting in concert. Shabazz contends that the instructions are erroneous given the allegation contained in the Information.

- 7) The evidence presented was insufficient to support Shabazz's conviction for murder.**

Shabazz admitted that helped Smith carry Ferris to the bathroom, but that he did so under duress. (i.e. Terry Smith pulled and pointed handgun at him.) Smith contends that the State

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did not prove beyond a reasonable doubt that he did not act under duress. For this and other reasons presented, Shabazz contends that there was insufficient evidence to support his conviction for murder.

ARGUMENT

1) The trial court erred in permitting a State's witness to testify via Zoom from an Indiana Department of Correction facility.

Prior to the jury being sworn and again contemporaneously at the time the witness was called, the defense objected to the testimony of State's witness Miquan Jones. (Tr. Vol. 2 p. 16, Vol. 3 p. 105). At the time of Shabazz's jury trial, Jones was an inmate of the Indiana Department of Correction. So, rather than subpoena and/or use a writ of habeas corpus ad testificandum, the State requested that his testimony be received via Zoom. The trial court allowed this testimony. Jones testified, pursuant to a plea agreement for an unrelated crime, that while he and Shabazz were in the Allen County Jail, Shabazz admitted to Jones that he killed Tiffany Ferris and that Shabazz threatened him. (Tr. Vol. 3 p. 107-109, 112). In allow this testimony, Shabazz argues that his constitutional rights were violated as well as the law governing "remote proceedings".

Prior to May 13, 2020, Administrative Rule 14 governed the use of "remote proceedings". However, by Emergency Order of the Indiana Supreme Court, that rule was modified due to the COVID 19 pandemic. Two years after that order, on September 13, 2022, the Court recognized that the emergency conditions no longer existed, but that remote proceedings – in appropriate cases and under appropriate circumstances – provide an efficient and effective means of accessing the court system for litigants and lawyers. So, the Committee On Rules of Practice and Procedure issued an interim rule effective January 1, 2023, which is still in effect today. See Indiana Supreme Court Cause No. 22S-MS-1 dated September 30, 2022.

This interim rule is set forth, in pertinent part below:

Interim Administrative Rule 14, Remote Proceedings

A. Definitions

1. A “remote proceeding” is any proceeding, including without limitation entire proceedings or parts of it, using telephone or videoconferencing capabilities to allow case participants to appear virtually.
2. A “case participant” includes the judge presiding over the case, court staff, parties, lawyers, guardians ad litem, witnesses, experts, interpreters, and any other persons the judge determines are directly related to the case.
3. A “testimonial proceeding” is a proceeding in which the judge receives sworn oral testimony.

B. Authority in Non-Testimonial Proceedings. ...

C. Authority in Testimonial Proceedings. A court must conduct all testimonial proceedings in person except that a court may conduct the proceedings remotely for all or some of the case participants for good cause shown or by agreement of the parties. Remote proceedings must comply with constitutional and statutory guarantees.

D. Opportunity for Confidential Communication. ...

E. Record. A court must create a record of the proceeding sufficient to enable a transcript to be produced for the Record on Appeal.

F. Oaths. Court reporters and other persons qualified to administer an oath in the State of Indiana may swear a person remotely provided the person is positively identified.

As to testimonial court proceedings, the commentary to Interim Rule 14 states:

... Presenting live testimony in court remains of utmost importance. For this reason, Rule 14(C) requires showings of good cause or agreement of the parties prior to allowing a remote appearance. A court must also have safeguards in place to ensure adequate identification of the witness and to protect against influences by persons present with the witness.

...

Case participants may object to a request for a remote proceeding or to a court’s order setting a remote proceeding.

Additionally,

... Courts are expected to handle objections in accordance with usual practice and procedure. ...

Under the pre-pandemic version of Administrative Rule 14, the following factors shall be considered in determining “good cause”:

- (a) Whether, after due diligence, the party has been unable to procure the physical presence of the witness;
- (b) Whether effect cross-examination of the witness is possible, considering the availability of documents and exhibits to counsel and the witness;
- (c) The complexity of the proceedings and the importance of the offered testimony in relation to the convenience to the party and the proposed witness;
- (d) The importance of presenting the testimony of the witness in open court, where the fact finder may observe the demeanor of the witness and impress upon the witness the duty to testify truthfully;
- (e) Whether undue surprise or unfair prejudice would result; and
- (f) Any other factors a trial court may determine to be relevant in an individual case.

Since trial counsel for Shabazz objected, the question becomes whether there was good cause shown and whether Shabazz’s constitutional rights to “face to face” confrontation were violated under Article 1 § 13 of the Indiana Constitution and the 6th Amendment of the Constitution of the United States. The colloquy regarding the State’s use of this Zoom testimony preceded *voir dire* and is set forth below:

MS. HELGE:... And that brings me to my last thing which is Miquan Jones Your Honor. Miquan Jones plead guilty and, and agreed to testify truthfully in this case. Miquan was disposed (*sic*) by all the parties. So, it was, Mr. Scremin was there as well as Mr. Allen on behalf of Terry Smith. Back on March 13th, 2023, subsequent to that I believe around September or, or October he picked up two never (*sic*) offense and violated his probation conditions. At that time then the revocation was filed and he was recently transported to the Department of Corrections. He was sent to our DC. Unfortunately, they won’t tell us where he’s going next at that point so we didn’t really know what to do to get, how to figure that out. The DOC will not

THE COURT: That's because they don't know yet.

MS. HELGE: - tell us. That's fair. That's very fair. Either way, they, anyways long story short Emily thought she had filed the transport order but we still didn't know where he was. She filed it last week. Unfortunately, the jail told us that they cannot transport him here because they sent him to a prison that's 4 hours away. So, they cannot bring him back for Trial. He is too, it is too, they don't have the resources unfortunately. So, where I'm going with this is, I talked to Mr. Scremin about that. We have contacted the Department of Corrections where he is, 4 hours away. They are, can make his (*sic*) available via video on Wednesday morning for us. It's a little bit nontraditional, but in the alternative, we would be requesting to use his deposition testimony and he's an unavailable witness under Rule 804. But I wanted to offer Mr. Scremin the opportunity to have him appear via video so that he could still cross examine him as it, you know, as an alternative to using his deposition.

THE COURT: What do you want to do?

MR. SCREMIN: Well, I'll object over all. Just for the sake of my client. I, I don't think he's an unavailable witness. I think he's in, he's in the State's custody and it's the State bringing the case so it can, get him here. I don't know what they could have done earlier. If there's something that needed to be done earlier to get him here. Either way, he's their witness in their control. He's also not an eye witness. I think he's going to be testifying about overhearing stuff as a jail snitch. So be that as it may, I think it's important for him to be here in person to look at who he's jail snitching on when he's testifying. I think that's important to his credibility or lack thereof. So, I would ask that he be here in person. If the Court is not inclined to grant or request it, prohibit him from testifying. I don't think reading a transcript it, that would be my last option. Because again, that, I think having him here in person again he's not unavailable. He's just not here. And -

THE COURT: So, you want him on Zoom?

MR. SCREMIN: I would have him on video before reading a transcript yes. I would object overall. I would prefer video but my first choice would be to have him here so my client can look him in the eye when he's I think, talking about what happens in the jail, and things he allegedly overheard.

THE COURT: Yeah, I guess, unconventional is the theme this week. But, the County doesn't have unlimited resources as in if they can't get him, they can't get him, but I mean so I guess we'll talk to George and have the T.V. rolled in. And have his testimony via video. You want to make sure you talk to him about that.

MS. Helge: Yes, Your Honor. Absolutely.

THE COURT: And -

MS. HELGE: And we would ask that -

THE COURT: - as you said he's not an eye witness anyway but I, what, it's the best we can do.

(Tr. Vol. 1 p. 16 ln. 3 through p. 18 ln. 5). When Jones was called to testify, defense counsel again objected. (Tr. Vol. 3 p. 105).

Ajaylan Shabazz contends that the trial court's allowance of this testimony violated his federal (6th Amendment) and Indiana (Article 1 § 13) constitutional rights as well as Interim Rule 14. The State's excuse and the trial court's reasoning set forth in the colloquy falls far short of what is required in determining "good cause".

While Interim Rule 14 does not specifically define "good cause", the interim rule and the commentary thereon requires that "remote proceedings must comply with constitutional and statutory guarantees"; "presenting live testimony in court remains of utmost importance"; and "a court must protect against influence by persons present with the witness". Further, courts are expected to handle objections in accordance with the usual practice and procedure.

In that regard, the pre-pandemic rule listed factors for the courts to utilize in determining good cause (see above). In applying those factors to Mr. Shabazz's case, reveals that "good cause" was not shown.

For example, there is no showing of due diligence on the part of the State. After all, Jones was in the custody of the State of Indiana. His whereabouts were known. "We tried" or "we don't have the man power" hardly suffices. Further, effective cross examination was jeopardized

by the remote testimony of a witness in the custody of the Indiana Department of Corrections.

The complexity of the proceedings and the importance of the offered testimony in relationship to the convenience to the party and the proposed witness should have been examined by the trial court. After all, Shabazz was facing a murder charge and the next sixty-three (63) years of his life were clearly impacted. Showing convenience to the State by not requiring that they use the normal method of a writ of habeas corpus ad testificandum to secure the testimony of Mr. Jones certainly does not outweigh the importance of the offered testimony to Ajaylan Shabazz.

Additionally, the importance of presenting such a witness in open court was essential where a jury may observe the demeanor of the witness and impress upon the witness the duty to testify truthfully.

For the reasons set forth above, Ajaylan Shabazz contends that his federal and State constitutional rights were violated, as well as the provisions of Interim Administrative Rule 14 which governs remote proceedings. He further claims that this violation denied him a fair trial. Accordingly, Shabazz requests that this Court vacate his murder conviction and grant him a new trial.

2) The trial court abused its discretion when it admitted evidence pursuant to Indiana Rule 404(b)(2).

Not too long after their involvement in the death of Tiffany Ferris, Ariona Darling, Terry Smith, and Ajaylan Shabazz committed an armed robbery of Henry Wright and Shondraya Johnson at the Hawthorne Suites in Fort Wayne, Indiana. By the time the murder trial commenced Darling had committed suicide and both Smith and Shabazz had pled guilty to Level 3 robbery charges in connection with that case.

The State sought to introduce evidence of this crime against Shabazz under Rule 404(b)(2) of the Indiana Rules of Evidence. The defense objected, arguing that this violated the forbidden inference set out in Rule 404(a)(1) and 404(b)(1) and the prejudicial effect of a full review of the details of the robbery case outweighed its probative value. Specifically as to the probative value, the defense conceded the fact that Shabazz had exchanged his shoes for the shoes of Henry Wright during the course of the robbery. The shoes Shabazz left at the Hawthorne had Ferris' DNA on them. Accordingly, the defense offered to stipulate these facts and avoid the prejudicial details of the robbery itself. The State refused the stipulation and sought to introduce the testimony of Wright and Johnson to fully detail other aspects of the robbery which the trial court allowed over defense objection.

Rule 404(a)(1) codifies the basic rule that evidence of a person's character or character traits is not admissible for the purpose of proving that such a person acted in conformity with his character on a particular occasion. The basic prohibition is often called the "propensity rule". Essentially, the fundamental exclusionary rule creates a forbidden inferential pattern. Under the rule a person's character or propensity to act in a certain way may not be offered as a basis for the

inference that on a specific occasion he acted in conformity with the propensity or the character trait. The basic exclusionary rule, often referred to as the “forbidden inference”, applies both in civil and criminal cases, but more frequently will be applied to exclude evidence in a criminal case.

Rule 404(b)(1) codifies an extension of the exclusionary principle of Rule 404(a)(1) and restates the implicit limitations on the proof of character evidence set out in Rule 405. Rule 404(b)(1) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that the person acted in conformity with a person’s character on a particular occasion. However, Rule 404(b)(2) lists exceptions to the exclusionary rule stating that evidence of other acts may be admitted to prove motive, intent, knowledge, common scheme or plan, identity, or absence of mistake or accident. In all cases, the fundamental question is whether the act is offered to prove character and conforming conduct only. If so, the evidence is rendered inadmissible by Rule 404(b)(1).

It is also important to keep in mind that when the proffered evidence is sought to be admitted under 404(b)(2), it is still subject to Rule 403's balancing test. *Fairbanks v. State*, 119 N.E.3d 564 (Ind. 2009). Specifically, Rule 403 provides that the court may exclude relevant evidence if it’s probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Thus, in applying Rule 403, the trial court must conclude that the evidence’s probative value is not “substantially outweighed” by the danger of unfair prejudice. This two-step analysis is unchanged from that used under pre-rule Indiana common law. *Brewer v. State*, 562 N.E.2d 22 (Ind. 1990).

Shabazz argues that the trial court's admission of the details of the robbery was erroneous for three reasons. First, despite the State's empty claim, there was no evidence from the robbery that would help that State prove what the motive of the Ferris murder was or what Shabazz's intent was. Identity of the murder participants was not an issue and the details of the robbery did not aid the State in that quest. Additionally, the evidence of the robbery did not show proof of opportunity, preparation, plan, knowledge, or absence of mistake or accident.

Second, even if any of the exceptions listed under 404(b)(2) existed, the probative value of such evidence was substantially outweighed by the danger of unfair prejudice. The testimony of Henry Wright in particular and what he (e.g. jumping out of a second story window to escape) and Ms. Johnson went through during the course of their robbery no doubt unduly excited the emotions and prejudices of the jury which would cause them to penalize Shabazz for these acts rather than making a dispassionate and objective evaluation of the facts of the murder case. (Tr. Vol. 2 p. 33-47).

Lastly, the danger of undue prejudice could have been easily avoided by the trial court. The evidence the State needed from the robbery – the shoes left by Shabazz at the scene of the robbery – could have been introduced without incident because the defense offered the State a stipulation regarding this evidence. (Tr. Vol. 2 p. 34-35). Apparently, getting relevant evidence in via stipulation was not enough. The State wanted and got more by the admission of irrelevant, emotional, and unduly prejudicial evidence.

As a result, Shabazz argues that he was denied a fair trial. Accordingly, he asks this Court to reverse his conviction and grant him a new trial.

3) The trial court erred in denying the defense's request for a jury instruction on assisting a criminal as a Level 5 felony.

Prior to the giving of final instructions, counsel for Shabazz requested that the trial court give an instruction on the crime of assisting a criminal as a Level 5 felony. Assisting a criminal is defined by I.C. 35-44.1-2-5. As it would relate to a murder case, the crime would be defined as follows:

Assisting a criminal.

(a) A person not standing in the relation of parent, child, or spouse to another person who has committed a crime or is a fugitive from justice who, with intent to hinder the apprehension or punishment of another person, harbors, conceals, or otherwise assists the person commits assisting a criminal, ...

(2) a Level 5 felony, if the person assisted has committed murder ...

In the colloquy settling final instructions, the trial court and counsel seem to agree that assisting a criminal was not a lesser included offense of murder. (Tr. Vol. 3 p. 221-222).

However, an analysis as to the statutory definition was not done by the parties. In that regard, I.C. 35-31.5-2-168 defines included offenses as follows:

“Included offense” means an offense that:

(1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;

(2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or

(3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

In any event, defense counsel formally requested the instruction and the trial court denied the request. (Tr. Vol. 2 p. 225).

Shabazz contends that assisting a criminal as a Level 5 felony fits the statutory definitions listed in I.C. 35-31.5-2-168 in that it is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged. Essentially, Shabazz's defense was that the lesser offense was more applicable to the prescribed conduct of which he was accused of engaging. Additionally, the instruction was a (1) correct statement of a law; (2) there was evidence in the record to support the giving of the instruction; and (3) the substance of the tendered instruction was not covered by other instructions. *Sylvester v. State*, 698 N.E.2d 1126, 1131 (Ind. 1998).

Accordingly, Shabazz contends that the trial court erred in refusing to give the instruction on the crime of assisting a criminal as a Level 5 felony and requests that this Court vacate his conviction and grant him a new trial.

- 4) The trial court erred in prohibiting defense counsel in his closing argument from arguing that the State failed to prove that Shabazz committed the murder, but may have proven that he had committed a lesser offense instead.**

As set forth above, the trial court refused to give an instruction on the crime of assisting a criminal as a Level 5 felony. The relevant colloquy on the matter is set forth below:

THE COURT: Alright. Any other instructions from anybody?

MR. SCREMIN: So, denied on the instruction, I mean even if it's not as a, as a certainly again it's not a lesser included, but as an instruction, I mean even if it's what assisting a criminal, that cannot be added?

THE COURT: Is your request for assisting a criminal instruction?

MR. SCREMIN: Right.

THE COURT: Is the State objecting to that?

MS. HELGE: We are.

THE COURT: Yeah. I'm, I'm not going to give that. I don't think that –

MR. SCREMIN: Okay. Can that be part of in closing, that that is a crime but that's not charged here?

THE COURT: No. Because the State lives and dies on what they charge. I don't think it's appropriate to comment on what charge they filed.

MR. SCREMIN: Okay.

THE COURT: They're actually what charges they didn't file I don't think is appropriate. They can file what they choose and you can comment on the charges they did file but not the ones they didn't.

MR. SCREMIN: Okay.

(Tr. Vol. 2 p. 225 ln. 8 through p. 226 ln. 1).

Shabazz contends that the trial court erred in refusing to allow his lawyer to argue that he had committed a lesser offense. It is reversible error to prevent a defendant from arguing the applicable law that supported his theory of the case. Without the ability to discuss this other statute, Shabazz was prejudiced, insofar as he was deprived of presenting his theory of defense. Consequently he is entitled to a new trial. *Dixey v. State*, 956 N.E.2d 776 (Ind.Ct.App. 2011); *Taylor v. State*, 457 N.E.2d 594, 599 (Ind.Ct.App. 1983).

Because he was prejudiced by the trial court's ruling which prevented him from presenting his defense Ajaylan Shabazz requests this Court to reverse his conviction and grant him a new trial.

- 5) **The the trial court erred in allowing the State to inform the jury that a co-participant, Ariona Darling, was deceased, but prevented the defense from informing the jury that her death was the result of a suicide.**

Soon after she was charged and arrested in connection with the related robbery case, Ariona Darling committed suicide in the Allen County Jail. In a pretrial motion, the State sought to inform the jury that Darling was deceased, but sought to prevent the defense from informing the jury that her death was a suicide. The colloquy regarding this issue is set forth below:

MS. HELGE: Yes, Your Honor, and this is something we need to talk about anyways in preliminary matters, Ariona Darling is an initial , I think we all hear a lot of evidence about these three working together. This individual Ariona Darling and Terry Smith. Ariona Darling was interviewed by law enforcement. As a result, charges were filed on Terry Smith or or they were coming. Ariona was taken to jail along with Shabazz for the robbery and in the course of being in jail she committed suicide. The reason that we want to keep that information out obviously her death is relevant or I mean the Jury will wonder where she is, why she's not here. We can say she died but I think to suggest she committed suicide is going to leave them in their heads speculating as to why she did that and I don't think that's appropriate since none of us can get into her mind and figure out exactly why it was she committed suicide. So it could have been for any number of reasons. The reason I think she, well we can address that in a second, she interviewed with Law Enforcement, the State feels that's hearsay. When she passed away we immediately knew that that was hearsay and we couldn't use it. I think Mr. Scremin was hoping we could use that for some reason so we need to talk about her separately for that reason but as far as her suicide, I don't see any probative value to that information. I think it would just leave the Jury wondering and and I think while Mr. Scremin may argue it's because she was involved in this Murder, I would argue it's because she lied about who did it. Either way, I just think its speculation. She tried to pin most of it on Mr. Smith, instead of herself and Mr. Shabazz. We know they're all involved but anyways that I would argue then that we don't bring out the fact that she committed suicide.

THE COURT: Mr. Scremin?

MR. SCREMIN: Well I don't think I would argue that she committed suicide because she was involved, I think I would argue that she committed suicide because that's just a fact. So if we tell the Jury she died and we don't tell them how or why then I there's just as much speculation. Did some co-defendant have

something to do with her murder? Was she murdered? Was she killed? Was she killed because of this case? Did something happen between a different co-defendant or witness or something? There's just as much speculation either way so why play hide the ball with the Jury? She killed herself in jail. It is what it is. It happened. It's not, it's not, I don't think you have to draw an inference one way or the other. I don't think there's an inference to draw one way or the other. It's just, it's just true. But if you, if you tell them she's dead, then they're going to speculate how did she die (*sic*) and is it because of one of the two co-defendants or witnesses or something to do with the trial or something else. So, I'd like them to know that's just a fact. That's Part A.

MS. HELGE: We're comfortable with whatever, we could use language that she's deceased, you know for reason unrelated to this case. I just I guess my problem is I just don't want us to say she committed suicide and then have people trying to characterize that. And I'm worried that that's what would happen. That in closing someone may try to characterize that as you know she felt so guilty about her being so involved. I, I just think that would be very unfair to characterize that suicide and argue about it and speculate (*sic*) and invite them to speculate as to why she did it.

MR. SCREMIN: I have no intention of I don't know what's in her mind it's just a fact. No intention of arguing that she did it for any particular purpose.

THE COURT: I don't contest that it's a fact but I also candidly don't see how it's relevant how she died. So if the parties want to say she died in a manner unrelated to this case or passed away or whatever you want to say that's fine but the manner in which she died whether it was a car crash or shooting, I don't see how that affects any of the elements of this case so that the, I'd agree with the State that it, the fact that it was a suicide isn't relevant to this case, but if the parties want to say she passed away, that she died you know that's fine but the fact that it was a suicide and the fact that it was in the County Jail, I'll show that granted as far as the motion goes. ...

(Tr. Vol. 2 p. 5 ln. 16 through p. 7 ln. 24).

So, the State was allowed, over defense objection, to tailor the narrative concerning the absence of Ms. Darling. Which begs the question, how was her absence relevant to the jury's consideration of the Shabazz case in the first place? The trial could have proceeded without the jury knowing this information. However, if her death was relevant to the proceedings, then the

fact that she committed suicide is relevant as well. *Stevenson v. State*, 29 N.E.3d 111 (Ind. 2015) (where a suicide attempt was used against the Defendant).

As defense counsel argued, speculation was going to occur regardless, so if you are going to say anything, how about the whole truth? That way there could be no speculation that Shabazz was involved in the death of Ms. Darling.

Fundamental fairness demands that our trial courts are even handed in matters of this kind. Allowing the State to have “its cake and eat it too” was prejudicial to Mr. Shabazz. Therefore, he respectfully requests this Court to reverse his conviction and grant him a new trial.

- 6) **The jury was not properly instructed on the crime charged considering the draftsmanship of the charging Information coupled with the jury's instructions given in this case.**

The Information filed in this case charged that:

“... On or about the 10th day of May, 2021, in the County of Allen and the in the State of Indiana, said defendant, Ajaylan M. Shabazz, while acting in concert with Terry Smith Jr., and/or Ariona Darling, did knowingly or intentionally kill another human being, to wit: Tiffany Ferris ...

The captioned statutory citation supporting the charge was I.C. 35-42-1-1. (App. Vol. II p. 25-26). During preliminary instructions, the court read the Information and listed the elements (without defining them) that the State would have to prove beyond a reasonable doubt before conviction could be authorized. (App. Vol. II p. 149-150). In particular, the trial court did not define the phrase “while acting in concert with”.

During final instructions, the trial court again read the Information and elements, as well as provided definitions for the terms “intentionally” and “knowingly”. (App. Vol. II p. 162-164). However, the trial court did not define the phrase “while acting in concert with”. Additionally, during this phase, the trial court defined accomplice liability based on I.C. 35-41-2-4 which provides that:

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:

- (1) Has not been prosecuted for the offense
- (2) Has not been convicted of the offense; or
- (3) Has been acquitted of offense

I.C. 35-41-2-4. (App. Vol. II p. 170).

Also, the trial court instructed the jury that:

Under accomplice liability theory, the evidence need not show that the accomplice personally participated in the commission of each element of a particular offense; rather, an accomplice is criminally responsible for all acts committed by an confederate which are a probable and natural consequence of their concerted action.

Neither mere presence at the scene of the crime nor negative acquiescence, standing alone, is sufficient to permit an inference that one participated in a crime. In determining whether a defendant aided another in the commission of a crime the jury may consider the following: (1) presence at the scene of the crime; (2) companionship with another engaged in the criminal activity; (3) failure to oppose the commission of the crime; and (4) the course of conduct before, during, and after the occurrence of the crime.

(App. Vol. II p. 171).

However, the trial court did not instruct the jury that the Defendant may be convicted of murder on a theory of accomplice liability only where he knowingly or intentionally aided or abetted the principal and where (1) the principal killed the victim and (2) the defendant knew or intended that the victim would be killed. *Taylor v. State*, 840 N.E.2d 324, 336-337 (Ind. 2006). Additionally, the trial court did not instruct the jury that criminal liability requires proof of voluntary conduct in violation of the statute whether the term “voluntary” is defined by case law or I.C. 34-41-2-1. *Small v. State*, 531 N.E.2d 498 (Ind. 1998); *Carter v. State*, 766 N.E.2d 377, 383 (Ind. 2002).

I.C. 35-41-2-1(a) provides:

A person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense. ...

As to these instructions, Shabazz contends that the jury was not properly instructed for three reasons.

First, the phrase “while acting in concert with” is not defined. Therefore, the jury did not know whether “acting in concert” is synonymous with “aids, induces, or causes” or whether accomplice liability requires additional analysis upon which to convict a defendant formally charged with “acting in concert with”.

Second, if the State is going to use the accomplice liability theory to convict, shouldn't Shabazz have been charged with (aiding) murder, alleging that he aided, induced, or caused Smith and/or Darling to commit the murder of Ferris under both I.C. 35-42-1-1 and I.C. 35-41-2-4.

Third, there was no instruction regarding voluntary conduct in that the jury was not instructed that criminal liability requires proof of voluntary conduct in violation of a criminal statute or that a person commits an offense only if he voluntarily engages in the conduct in violation of the statute defining the offense. Generally, the courts of this State have long disapproved instructions that unduly emphasize one particular evidentiary fact, witness, or phase of the case. *Fowler v. State*, 900 N.E.2d 770, 733 (Ind.Ct.App. 2009) (quoting *Ham v. State*, 826 N.E.2d 640, 641-642 (Ind. 2005)). An instruction as to what evidence warrants an inference of guilty clearly invades the jury's province. *Id.* (quoting *Crawford v. State*, 550 N.E.2d 759, 761 (Ind. 1990)). The jury must be instructed that accomplice liability requires proof that the defendant engaged in voluntary conduct in concert with his accomplice. Moreover, an accomplice liability instruction that draws the focus of the jury away from the total circumstances showing defendant's knowledge and conduct is improper. *Boney v. State*, 880 N.E.2d 279, 293 (Ind.Ct.App. 2008)(internal citations omitted), *trans. denied*; *Townsend v. State*, 934 N.E.2d 118 (Ind.Ct.App. 2010).

Shabazz concedes that his trial attorney did not offer instructions on this issue or object to the giving of the trial court's instructions as a whole. Consequently, he must rely on fundamental error to prevail. A claim that has been waived by a defendant's failure to raise a contemporaneous objection can be reviewed on appeal if the reviewing court determines that a fundamental error occurred. *See, e.g., Trice v. State*, 766 N.E.2d 1180, 1182 (Ind. 2002); *Hayworth v. State*, 904 N.E.2d 684, 694 (Ind.Ct.App. 2009). The fundamental error exception is "extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Clark v. State*, 915 N.E.2d 126, 131 (Ind. 2009). This exception is available only in egregious circumstances." *Brown v. State*, 799 N.E.2d 1064, 1068 (Ind. 2003).

In Indiana, fundamental error is an exception to the rule that a parties' failure to object at trial results in a waiver of the issue on appeal. It occurs when an error makes a fair trial impossible or violates basic principles of due process, and has the potential for substantial harm. For example, in criminal law, fundamental error could be an error that effects the validity of the trial so much that a guilty verdict could not have been obtained without it. Rule 103 of the Indiana Rules of Evidence also allows a court to take notice of fundamental error even if the claim of error was not properly preserved.

Accordingly, Shabazz would request that this Court rule on the merits of his claim regarding improper jury instruction, find that the jury was improperly instructed, vacate his conviction, and grant him a new trial.

7) The evidence presented was insufficient to support Shabazz's conviction for murder.

Ajaylan Shabazz argues that there was insufficient evidence presented at his trial to support his convictions. In doing so, Shabazz is mindful that, when reviewing a claim of insufficient evidence, it is well established that an appellate court does not reweigh evidence or assess the credibility of witnesses. *Walker v. State*, 998 N.E.2d 724, 726 (Ind. 2013). Instead, the reviewing court considers all of the evidence, and any reasonable inferences that may be drawn therefrom, in the light most favorable to the verdict. *Id.* A conviction should be affirmed unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007); *Davis v. State*, 813 N.E.2d 1176, 1178 (Ind. 2004).

Shabazz contends that no reasonable trier of fact could find him guilty beyond a reasonable doubt given the evidence presented and any reasonable inferences which could be drawn therefrom. The guilty verdict rendered by the jury in this case was the product of the jury's emotional and visceral reaction to Ferris being slain and the prosecution's choice of Shabazz as the perpetrator of the murder to the exclusion of other likely suspects.

First, it should be noted that testimony implicating Ajaylan Shabazz came from individuals who testified pursuant to plea agreements – most notably Terry Smith. Even though Smith had secured a plea agreement calling for a 12 year executed sentence on an aggravated battery of Ferris, during his testimony Smith disavowed his plea of guilty (made under oath) and told the jury he was only responsible for helping remove and dispose of items from the storage room.

Smith also contradicted himself during his trial testimony by first saying, during direct examination, that Ferris' head struck a dresser when being carried by Shabazz. Then, on cross examination, Smith admitted that he did not see that happen.

Shabazz testified that he saw Smith beating on Ferris and tried to intervene by punching Smith. At that point, Smith pulled a handgun, later found by police, and ordered Shabazz to help him carry Ferris to the bathroom. Shabazz confirmed that he acted under duress. Shabazz also testified about the sounds he heard as Smith was drowning Ferris. Dr. Hershberger confirmed that Ferris' death was consistent with being drowned.

As to the issue of duress, apparently, the court and counsel agreed that the defense of duress was appropriate in this case and the jury was instructed on the matter. (Tr. Vol. 2 p. 222-225). The instruction also stated that the State must prove beyond a reasonable doubt that Shabazz did not act under duress. In this regard, Shabazz contends that the State failed to do so.

In short, given the evidence presented, no reasonable jury could determine beyond a reasonable doubt what any of the individuals did which contributed to Ferris' death. Therefore, Ajaylan Shabazz respectfully requests that this Court find that there was insufficient evidence to support his conviction and asks that his conviction be vacated and that he be discharged.

CONCLUSION

For the reasons set forth above, Ajaylan M. Shabazz requests that his convictions for Felony Murder be reversed and that he be discharged. In the alternative, Shabazz requests that he be granted a new trial, and for all other just and proper relief in the premises.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Based upon my reliance on the word count of the word processing system used to prepare the brief, I verify that this brief contains less than 14,000 words.

/s/ Gregory L. Fumarolo

Gregory L. Fumarolo

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was Efiled using IEFS and served by IEFS on Theodore Rokita, Attorney General this 21st day of August, 2024.

/s/ Gregory L. Fumarolo

Gregory L. Fumarolo