Filed: 10/22/2024 2:27 PM

IN THE
COURT OF APPEALS OF INDIANA

No. 24A-CR-909

AJAYLAN SHABAZZ, *Appellant-Defendant*, v. STATE OF INDIANA, *Appellee-Plaintiff*.	Appeal from the Allen Superior Court, No. 02D06-2111-MR-000020, The Honorable David M. Zent, Judge.

STATE'S BRIEF OF APPELLEE

THEODORE E. ROKITA
Indiana Attorney General
Attorney No. 18857-49

JODI KATHRYN STEIN
Deputy Attorney General
Attorney No. 16849-49

OFFICE OF INDIANA ATTORNEY
GENERAL TODD ROKITA
Indiana Government Center South
302 West Washington Street, Fifth Floor
Indianapolis, Indiana 46204-2770
Telephone: 317-232-6249
Jodi.Stein@atg.in.gov

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

I. Whether Defendant was denied his right to confront a witness who testified remotely from the Department of Correction, was cross-examined by Defendant, and observed by the jury.

II. Whether fundamental error occurred by the admission of evidence of a robbery committed by Defendant and his accomplices shortly after the murder, during which Defendant disposed of evidence of the murder.

III. Whether the trial court properly refused to instruct the jury on the offense of Level 5 felony assisting a criminal as a lesser included offense to murder, and whether the trial court properly limited Defendant's closing argument to exclude that offense because the evidence did not support it.

IV. Whether the trial court properly excluded evidence that an accomplice to the murder died by suicide shortly after the murder.

V. Whether fundamental error occurred by the manner in which the trial court instructed the jury on accomplice liability.

VI. Whether the evidence was sufficient to support Defendant's murder conviction.

STATEMENT OF THE CASE

Nature of the Case

Ajaylan Shabazz ("Defendant") appeals his murder conviction following a jury trial.

Course of Proceedings

The State charged Defendant on November 1, 2021, with murder (App. Vol. II 25). Defendant proceeded to a jury trial on February 12, 2024 (App. Vol. II 157-59, 181; Tr. Vol. I, II, III). On February 16, 2024, the jury found Defendant guilty (App. Vol. II 180-81; Tr. Vol. III 17-18). At sentencing on March 18, 2024, the trial court imposed a 63-year executed sentence (App. Vol. II 207; Tr. Vol. III 33). Defendant filed a notice of appeal on April 17, 2024 (App. Vol. II 212-14).

STATEMENT OF THE FACTS

Unbeknownst to management at the Suburban Inn on West Coliseum Boulevard in Ft. Wayne, a back storage room—Room 1078—was used by the homeless for shelter and drug use; access was made through a window behind a fence (Tr. Vol. I 133-34, 149-50, 160-61, 177, 180-81; II 188; State's Ex. 2-5, 10-11, 60, 87). The conditions in the room were deplorable, a mixture of trash, dirt, extra furniture and doors, and scaffolding (Tr. Vol. I 166, 188; II 65; State's Ex. 65-80). On the evening of May 9, 2021, Dustin Blair and Tiffany Ferris spent time there; Ferris was "dope sick" as she withdrew from fentanyl, and Blair was withdrawing from crystal methamphetamine (Tr. Vol. I 135-36; State's Ex. 1). Ferris slept in a chair as she struggled with cramps, cold chills and sweats, and vomiting (Tr. Vol. I 135-36).

Around 11:30 p.m. that night, Defendant and his fiancé Ariona ("Ari"), who also often used Room 1078, walked to the Shell gas station nearby on Coliseum (Tr. Vol. I 134-35, 184; State's Ex. 9). There, Defendant encountered Terry Smith;

Smith had driven from Bluffton with Amy Monholland to trade drugs for marijuana (Tr. Vol. I 183-85, 209-10; II 183). Initially, Smith approached Defendant about "buying" Ari for the night, but Defendant told him that Ari was his fiancé (Tr. Vol. I 184; II 190). Smith and Defendant then discussed Smith's desire to trade drugs for marijuana; Defendant told Smith that he knew a few people in the area and agreed to help Smith (Tr. Vol. I 184-85; II 190). Defendant told Ari of the plan, and the two left in Smith's black and grey Ford F-150, license plate "6SMITH" (Tr. Vol. I 186, 202, 242; II 191; State's Ex. 9, 120-26).

Defendant directed Smith to the back of the Suburban Inn to a shared parking lot with the Economy Inn (Tr. Vol. I 186-87, 210; II 190-91). Defendant, Ari, and Smith entered Room 1078 through the window; asleep, Monholland stayed in Smith's truck (Tr. Vol. I 135, 187; II 191). Although he knew Defendant and Ari, Blair was surprised when they came in with Smith (Tr. Vol. I 135-36, 188; II 191). The situation felt awkward to Blair, so he left and sought out shelter for the night in his sister-in-law's vehicle at the Shell gas station where she worked (Tr. Vol. I 136-37, 188, 220; II 191). When Blair left, Ferris was uninjured and asleep in the chair (Tr. Vol. I 137, 141). Defendant left a short time later to arrange Smith's drug trade (Tr. Vol. I 188; II 191).

Ari, Ferris, and Smith remained in the room (Tr. Vol. I 188-89, 210). Ari looked around the room, as if searching for something, and quickly accused Ferris of stealing her drugs (Tr. Vol. I 188-89). Ari became irate and started to punch Ferris, asking, "Where's my stuff?" while forcing Ferris to take off her clothes so Ari could

search her (Tr. Vol. I 186, 196). Ari messaged "911" to Defendant; he quickly returned to Room 1078 (Tr. Vol. I 229-30; II 191-92).

Out of control and beating Ferris, Ari told Defendant that Ferris had stolen her drugs (Tr. Vol. I 190-91). Defendant picked up Ferris, who was a small woman, and slammed her to the floor, striking Ferris's head on the corner of dresser as he did so (Tr. Vol. I 191-92, 208, 215; II 32). Defendant stomped and kicked Ferris's head as she begged him to let her go (Tr. Vol. I 192-93, 209, 215). Ferris started to bleed everywhere, including on the carpet (Tr. Vol. I 191-92, 215). Ari declared, "We need to take care of this" and "finish her off or something" (Tr. Vol. I 192). Defendant and Ari carried Ferris into the bathtub (Tr. Vol. I 192-93). Smith left for the Shell gas station but did not call anyone to help Ferris (Tr. Vol. I 193-94, 204, 211, 243).

Defendant and Ari drowned a badly beaten Ferris in the bathtub (Tr. Vol. II 21-30, 33, 194-95; State's Ex. 28-42). Fluid in her sinus cavity and lungs showed that Ferris was alive at the time of the drowning, and she showed injuries consistent with being forcibly held down (Tr. Vol. II 23, 32, 195, 201). Defendant called Smith, and he returned to Room 1078 to observe Ferris dead in the bathtub (Tr. Vol. I 193-96, 243; State's Ex. 6). Defendant and Ari started to clean up the room, cutting a piece of bloody carpet from the floor (Tr. Vol. I 194-95; II 77, 196; State's Ex. 119). Ari also tried unsuccessfully to put a needle in Ferris's arm to stage an overdose (Tr. Vol. I 138, 194; II 203).

Hours later, around 6:00 a.m., the three carried white trash bags to Smith's truck and left, disposing the trash bags in local dumpsters (Tr. Vol. I 197, 199, 204, 212, 241-42, 245-46; II 198, 202-03; State's Ex. 7). A short time later, Blair's sister-in-law woke Blair, gave him cash and cigarettes, and left (Tr. Vol. I 137). Blair returned to Room 1078 and found Ferris dead in the bathtub (Tr. Vol. I 138). He grabbed a needle lying next to the tub, not wanting anyone to think Ferris was a drug addict (Tr. Vol. I 138). Blair returned to the Shell gas station and told George Harker about finding Ferris; after Harker returned with Blair to Room 1078 to verify, Harker called 911 (Tr. Vol. I 138-39, 224-25). Blair identified Defendant and Ari as being in the room the night prior with he and Ferris, and he told police Defendant's Facebook name (Tr. Vol. I 139, 227; Ex. Vol. I 249-50; Ex. Vol. II 2-3).

Later that morning, Defendant, Ari, and Smith hatched a plan to rob Henry Wright; Ari wanted drugs and Defendant said that Wright owned some items (Tr. Vol. I 200; II 183-84). Ari texted Wright, who stayed at the Hawthorne Suites about five minutes from the Suburban Inn, and Wright invited her to his room (Tr. Vol. I 201, 228; II 8, 14, 36-37, 44, 198). When Wright opened the door, Defendant and Smith were with her, armed with a knife and gun respectively (Tr. Vol. I 201-02; II 8, 37-39, 183-84, 204-05). Defendant ordered Wright to lie on the floor as the three robbed him of several items (Tr. Vol. I 201-02, 217; II 8, 38-40, 45, 212). At one point, Defendant removed his tennis shoes and put on a pair of Wright's shoes, leaving his blood-stained shoes behind (Tr. Vol. II 8, 40, 45, 118-19, 206; State's Ex. 170-72). When the robbery was finished, Defendant ordered Wright to stand up at

gunpoint; Wright thought he was going to be shot, so he jumped out the third-floor window to escape (Tr. Vol. II 7, 41, 45; State's Ex. 16-26). Wright called 911 and identified Defendant as one of the robbers (Tr. Vol. I 228-29; II 4-7, 39, 42, 45-46, 116-17; State's Ex. 43-44). Defendant's discarded bloody shoes were collected by police, and Ferris's DNA was later found on the shoes (Tr. Vol. II 86, 119, 121, 164-71; State's Ex. 170-72, 204).

After the robbery, Smith drove Defendant and Ari to Indianapolis, where he told Munholland it was safe to leave (Tr. Vol. I 203, 218; II 206-02). Detectives quickly connected Ferris's murder to Wright's robbery, and surveillance video from the Hawthorne Suites gave police a description of Smith's distinctive truck and license plate (Tr. Vol. I 228-29; II 121-22). Detectives were also able to determine Defendant's cellphone number, and T-Mobile information confirmed Defendant's cellphone in the general vicinity of both the Suburban Inn and the Hawthorne Suites at the relevant times (Tr. Vol. I 229-30).

GPS "ping" location information placed Defendant's cellphone on the Northeast side of Indianapolis, where the three were staying in a hotel (Tr. Vol. I 203, 230; II 206-07). Two days later, on May 12, 2021, the U.S. Marshall Task Force located Smith's truck at the Sheraton Hotel in the Keystone at the Crossing area, and they followed it to the Fashion Mall (Tr. Vol. II 49-50; Ex. Vol. II 3-4). Defendant, Ari, and Smith were apprehended as they left the mall and transported back to Ft. Wayne (Tr. Vol. I 203, 232; II 50-51, 53-54). Defendant was found in possession of paperwork from Room 1078 and was wearing Wright's unusual

eyeglasses (Tr. Vol. II 40, 68, 77, 83, 122-23; State's Ex. 72, 90, 109, 149, 158, 205-207)

Defendant gave a statement to police denying any knowledge of Ferris's murder, which he later reiterated in a letter to Detective Cline (Tr. Vol. I 232-33; II 207-09; State's Ex. 14, 216). Defendant then alerted Ari, who was sitting in a nearby interview room, that the detectives were asking about the Suburban Inn (Tr. Vol. I 235). Smith told police a few days later that he had seen Defendant and Ari beat Ferris (Tr. Vol. I 203-04, 235-36, 247). While at the jail, inmate Miquan Jones overheard a conversation between Defendant and Ari in which Defendant admitted to killing Ferris, which Jones shared with his attorney and detectives (Tr. Vol. II 107-08). A little over a month later, on June 27th, Ari committed suicide while incarcerated (Tr. Vol. I 5, 243).

In November, the State charged Defendant and Smith with Ferris's murder under an accomplice liability theory (App. Vol. II 25; Tr. Vol. I 205). In mid-2022, while incarcerated in the Allen County jail, Defendant admitted to Blair that he "killed that bitch" and told Blair to keep his mouth shut or Blair would end up like she did (Tr. Vol. I 139, 142, 145). Defendant sent a note to Jones, through a jailer, that told Jones to change his story or be killed (Tr. Vol. II 108-09; State's Ex. 212; Ex. Vol. II 7-10). Surveillance video captured the jailer transferring the note from Defendant's cell to Jones's cell (Ex. Vol. II 10). Defendant also sent a note to Smith that Ari was dead and to "keep it solid" and use her as a scapegoat (Tr. Vol. II 213; State's Ex. 217). In April of 2023, Smith pled guilty to Level 3 felony aggravated

battery for Ferris's death and agreed to a 12-year executed sentence (Tr. Vol. I 205-06, 209, 214; State's Ex. 12). The plea agreement required Smith to testify truthfully at Defendant's trial (Tr. Vol. II 205-06; State's Ex. 12).

Following a four-day trial, the jury found Defendant guilty of Ferris's murder (App. Vol. II 180-81; Tr. Vol. III 17-18). The trial court imposed a 63-year executed sentence (App. Vol. II 207; Tr. Vol. III 33).

SUMMARY OF THE ARGUMENT

I. The trial court did not violate Indiana Administrative Rule 14 when it permitted Jones to testify remotely from the Department of Correction over Defendant's objection, nor was Defendant denied his right to confront Jones. The trial court made particular findings of good cause based on the circumstances in this case. Jones's location was unknown prior to trial, and the county did not have the resources to transport Jones once his location was determined. Defendant suffered no prejudice, as Jones was an inconsequential witness, Defendant cross-examined Jones, and the jury observed Jones during his testimony to determine his credibility.

II. Fundamental error did not occur by the admission of evidence that Defendant, Smith, and Ari committed a robbery shortly after murdering Ferris under Indiana Evidence Rules 404(b) and 403. The evidence showed the relationship between the three accomplices, Defendant's position of authority, and it linked Defendant to the murder through his shoes that he discarded at the robbery. Defendant does not show that the probative value of the evidence was substantially

outweighed by prejudice. Any danger of the jury's misuse of the robbery was minimized by the limiting instruction and the overwhelming evidence supporting Defendant's murder conviction.

III. The trial court properly refused to instruct the jury, and properly limited Defendant's closing argument, on assisting a criminal as a lesser-included offense of murder. Assisting a criminal is not an inherently included offense of murder, nor was it factually included as charged in this case. The trial court also properly rejected Defendant's request to argue assisting a criminal as an uncharged crime in closing argument because it was not based on the evidence and would have misled the jury as to the applicable law. Defendant fails to show prejudice.

IV. The trial court properly admitted evidence that Ari was deceased at the time of trial but excluded evidence that she died by suicide. It would have been prejudicial to Defendant for the jury to speculate that Ari committed suicide because she was overcome by a guilty conscience, when the evidence showed that Defendant and Ari killed Ferris together. The exclusion of how Ari died had no probable impact on the jury's decision that Defendant murdered Ferris because the evidence was overwhelming.

V. Fundamental error did not occur by the manner in which the jury was instructed on accomplice liability. Defendant provides no authority that the jury must be separately instructed on the definition of "acting in concert" or that his conduct must be voluntary. The instructions as whole adequately conveyed both concepts.

VI. The jury had ample evidence to find Defendant guilty of murdering Ferris. Eyewitness testimony, DNA evidence, surveillance video, and Defendant's admissions provided overwhelming evidence of his guilt. This Court should affirm Defendant's murder conviction.

ARGUMENT

I.
The trial court properly allowed a witness to testify remotely from the Department of Correction.

The trial court did not violate Indiana Administrative Rule 14 when it permitted Jones to testify remotely from the Department of Correction (DOC) over Defendant's objection, nor was Defendant denied his right to confront Jones. The essential purpose of the Sixth Amendment right of confrontation is to ensure that the defendant has the opportunity to cross-examine the witnesses against him. *Howard v. State*, 853 N.E.2d 461, 464-65 (Ind. 2006). Indiana's right to a face-to-face meeting is, "[t]o a considerable degree, ... co-extensive" with the federal confrontation right, *Brady v. State*, 575 N.E.2d 981, 987 (Ind. 1991), but differs in that it contemplates a face-to-face meeting in which the accused and the witness can see and recognize one another. *Hutcherson v. State*, 966 N.E.2d 766, 771 (Ind. Ct. App. 2012) (citing *Williams v. State*, 698 N.E.2d 848, 852 (Ind. Ct. App. 1998), *trans. denied*), *trans. denied*. Defendant secured both of those interests.

Administrative Rule 14(C) provides, in relevant part:

> 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.

As this Court recently noted, "[p]resenting live testimony in court remains of utmost importance." *G.W. v. Madison State Hospital*, ___ N.E.3d ___, No. 23A-MH-2452, slip op. at 6-7 (Ind. Ct. App. Sept. 20, 2024) (citing *B.N. v. Health & Hosp. Corp.*, 199 N.E.3d 360, 365 (Ind. 2022)); Admin. Rule 14(C) Commentary. Rule 14(C) authorized the trial court to permit Jones's remote testimony, over Defendant's objection, if the trial court determined there was good cause. A finding of good cause under Rule 14(C) requires a showing of particularized and specific factual support. *B.N.*, 199 N.E.3d at 364. There must be "something specific to the moment, the case, the court, the parties, the subject matter, or other relevant considerations." *Id.* at 364-65. Defendant challenges only the trial court's finding of good cause for Jones to testify remotely (Appellant's brief at 22, 24). This Court reviews a trial court's finding of good cause for an abuse of discretion. *B.N.*, 199 N.E.3d at 363.

The record supported the trial court's finding of good cause. New charges had been filed against Jones, and he was found to have violated his probation and sent to the DOC (Tr. Vol. I 16). At the point in time that the State tried to file a motion to transport Jones, the DOC did not know where Jones would be housed at the time of trial (Tr. Vol. I 16). By the time of trial, Jones was housed in a facility, but it was four hours from Ft. Wayne; the Allen County jail lacked the resources to transport Jones back for trial (Tr. Vol. I 16). The trial court found that Jones was not an eyewitness—so not a crucial witness—and that the county did not have unlimited

resources to secure his attendance, so remote testimony was the best option (Tr. Vol. I 17-18; II 105-06). These facts were "particularized and specific" to the circumstances. *B.N.*, 199 N.E.3d at 364-65.

Defendant's argument that the State did not exercise diligence is unfounded. The record shows that the State sought to obtain Jones's location in advance for the motion to transport, but even DOC did not know where he would be housed in February of 2023, as the trial court noted (Tr. Vol. I 16). By the time Jones's housing location was known, the county lacked the resources to pick up Jones and transport him back to Allen County (Tr. Vol. I 16-17). Defendant offered no evidence at trial to rebut these factual findings.

Defendant shows no prejudice. Defendant fully and effectively cross-examined Jones, whose importance rested solely on overhearing a conversation between Defendant and Ari (Tr. Vol. II 106-13). Even without this testimony, the evidence supporting Defendant's murder conviction was overwhelming. The jury observed Jones's demeanor over a monitor, as the trial court noted, "you can see his whole body. You can see his face. You can see he's disappointed right now looking around …" (Tr. Vol. II 105-06). Defendant thus secured both his right to cross-examine Jones and exercise face-to-face confrontation. The trial court did not abuse its discretion by permitting Jones to testify remotely. This Court should affirm Defendant's murder conviction.

II.
Fundamental error did not occur from the admission of evidence of the robbery under Indiana Evidence Rules 404(b) and 403.

Evidence that Defendant, Smith, and Ari committed a robbery shortly after murdering Ferris was admissible under Indiana Evidence Rules 404(b) and 403. Although Defendant lodged an objection to the admission of this evidence pre-trial and he renewed the objection prior to Wright's testimony, Defendant lodged no objection to the admission of evidence of the robbery through Smith, Detective Cline, and Officer Geiger (Tr. Vol. I 201-02, 217, 228-29; II 4-14, 34-35; Supp. Tr. 2-14).[1] The failure to object to the admission of evidence normally results in waiver and precludes appellate review unless its admission constitutes fundamental error. *Rogers v. State*, 130 N.E.3d 626, 629 (Ind. Ct. App. 2019) (citing *Whatley v. State*, 908 N.E.2d 276, 280 (Ind. Ct. App. 2009), *trans. denied*). Defendant waived this evidentiary issue by failing to object to the first three witnesses who testified to the robbery.

To circumvent waiver, Defendant must thus show that the admission of the evidence was fundamental error. *Ryan v. State*, 9 N.E.3d 663, 667-68 (Ind. 2014). The fundamental error exception is extremely narrow and applies only when the error constitutes a blatant denial of basic due process principles that makes it impossible to receive a fair trial. *Id.*; *Halliburton v. State*, 1 N.E.3d 670, 678 (Ind. 2013). Thus, a matter rising to the level of fundamental error is one that the trial

[1] The trial court granted Defendant a continuing objection but only after the first three witnesses had testified to the robbery (Tr. Vol. II 35).

court had a *sua sponte* duty to correct; it does not provide a second bite at the apple where defense counsel ignorantly, carelessly, or strategically fails to object. *See Ryan*, 9 N.E.3d at 668.

While Rule 404(a) prohibits evidence of a person's character to prove that the person acted in accordance with that character to protect against that "forbidden inference," Rule 404(b) allows the admission if it is for another purpose, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Erickson v. State*, 72 N.E.3d 965, 973-74 (Ind. Ct. App. 2017) (citing *Nicholson v. State*, 963 N.E.2d 1096, 1099-100 (Ind. 2012)), *trans. denied*. In assessing the admissibility of evidence under 404(b), the trial court must first determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act, and then balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. *Laird v. State*, 103 N.E.3d 1171, 1177 (Ind. Ct. App. 2018) (citing *Halliburton*, 1 N.E.3d at 681-82), *trans. denied*.

The effect of Rule 404(b) is that evidence is excluded only when it is introduced to prove the forbidden inference of demonstrating the defendant's propensity to commit the charged crime. *Id*. (citing *Rogers v. State*, 897 N.E.2d 955, 960 (Ind. Ct. App. 2008), *trans. denied*). The trial court has wide latitude in weighing the probative value of the evidence against the possible prejudice of its admission. *Bishop v. State*, 40 N.E.3d 935, 952 (Ind. Ct. App. 2015), *trans. denied*. If evidence has some purpose besides behavior in conformity with a character trait

and the balancing test is favorable, the trial court can elect to admit the evidence. *Id*.

At the evidentiary hearing, the State argued that evidence of the robbery was probative of Defendant, Smith, and Ari's relationship as they acted in concert, and evidence from the robbery connected Defendant to the murder by proximity, time, and the DNA evidence that Defendant discarded (Supp. Tr. 7-10; Tr. Vol. II 34). The trial court specified the reasons why evidence of the robbery was admissible:

> The evidence relating to the [robbery] is very close in time and proximity to the alleged offense in this case. The evidence is relevant and probative to the relationship of the co-defendants and it connects the defendant to this case. The probative value is not substantially outweighed by the prejudicial impact.

(App. Vol. II 58; Tr. Vol. II 35). Defendant fails to show that this ruling amounted to error, let alone fundamental error.

Defendant was charged as an accomplice with Smith and/or Ari in killing Ferris (App. Vol. II 25). Within hours of killing Ferris, Defendant, Smith, and Ari worked together to dispose of evidence from the murder in local dumpsters and then schemed to rob Wright (Tr. Vol. I 194-95, 197, 199, 204, 212, 241-42, 245-46; II 77, 196, 198, 202-03; State's Ex. 7, 119). The three worked together to plan the robbery: Ari made the call to Wright, and then Defendant and Smith showed up, armed (Tr. Vol. I 200-01, 228; II 8, 14, 36-37, 44, 183-84, 198). During the robbery, Defendant was a principal actor, ordering the participants around (Tr. Vol. I 201-02, 217; II 8, 38-40, 45, 212). This evidence showed the relationship between Defendant, Smith, and Ari as a collective body of accomplices. The fact that the three acted so well

together for the robbery—only hours later—made it more probable that the three also worked together to kill Ferris. Defendant raised the relevance of this evidence even higher at trial, when he testified to participating in Ferris's murder only under threat by Smith and to just "going along" with Smith as Smith robbed Wright (Tr. Vol. II 183-84). Defendant's leading role in the robbery rebutted his claim of not being an active participant in Ferris's murder. Evidence of the robbery was admissible under Rule 404(b) to show the relationship of the accomplices, which Defendant does not dispute on appeal (Appellant's brief at 28).

Evidence of the robbery was also relevant to connect Defendant to Ferris's murder. Defendant adamantly denied any knowledge of Ferris's murder to police (Tr. Vol. II 207-08; State's Ex.14, 216). He placed his presence at the scene in issue, contrary to his argument (Appellant's brief at 28). Defendant discarded his shoes during the robbery, shoes contaminated with Ferris's DNA (Tr. Vol. II 86, 119, 121, 164-71; State's Ex. 170-72, 204). This evidence placed Defendant at the scene of Ferris's murder, which was highly probative evidence.

Evidence of the robbery was also admissible under Indiana Evidence Rule 403, which permits the court to "exclude relevant evidence if its 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." A trial court's evidentiary rulings are presumptively correct, and the "defendant bears the burden on appeal of persuading us that the court erred in weighing prejudice and probative value under Evidence

Rule 403." *Rivera v. State*, 132 N.E.3d 5, 12 (Ind. Ct. App. 2019) (citing *Anderson v. State*, 681 N.E.2d 703, 706 (Ind. 1997)). The determination of whether there is a risk of unfair prejudice depends on "the capacity of the evidence to persuade by illegitimate means, or the tendency of the evidence to suggest decision on an improper basis." *Id.* (citing *Camm v. State*, 908 N.E.2d 215, 224 (Ind. 2009)). "All evidence that is relevant to a criminal prosecution is inherently prejudicial, and thus the Evidence Rule 403 inquiry boils down to a balance of the probative value of the proffered evidence against the likely *unfair* prejudicial impact of that evidence." *Duvall v. State*, 978 N.E.2d 417, 428 (Ind. Ct. App. 2012) (citing *Carter v. State*, 766 N.E.2d 377, 382 (Ind. 2002)).

Defendant does not sustain his burden of overcoming the presumption that the trial court's weighting of probative value and prejudice was correct (Appellant's brief at 28). The facts of the robbery, and particularly Wright's testimony as to Defendant's principal role, were the highly probative evidence. Any danger of the jury's misuse of the robbery was minimized by the limiting instruction and the fact that it paled in comparison to Ferris's brutal murder (App. Vol. II 166). Further, while Defendant claims on appeal that he offered to stipulate to the admission of Defendant's shoes, that is not reflected in the record (Tr. Vol. II 34-35; Supp. Tr. 2-14). Nor would that stipulation have served the other non-propensity purpose of the evidence, which was to show how the three accomplices acted in concert shortly after Ferris's murder.

Defendant fails to demonstrate fundamental error from the admission of the robbery evidence (Appellant's brief at 28). Where evidence of guilt is overwhelming, any error in the admission of evidence is not fundamental. *Halliburton*, 1 N.E.3d at 683 n.7. The evidence that Defendant acted with Smith and/or Ari to kill Ferris was overwhelming. Defendant and Ari beat Ferris before dragging her into the bathtub; when Smith returned a short time later, Ferris was dead in the tub, and Defendant and Ari were cleaning up the room (Tr. Vol. I 194-95; II 77, 196; State's Ex. 119). Defendant's shoes were contaminated with Ferris's DNA, and his cellphone showed his general proximity to the Suburban Inn on the night of the murder (Tr. Vol. I 229-30; II 86, 119, 121, 164-71; State's Ex. 170-72, 204). Defendant admitted to Blair that he killed Ferris, he was overheard in the jail admitting to killing Ferris, and he tried to persuade Smith to "keep it solid" and work together to blame Ari for the murder (Tr. Vol. I 139, 142, 145; II 107-08, 213; State's Ex. 217). *See Berry v. State*, 715 N.E.2d 864, 867 (Ind. 1999) (finding that the erroneous admission of evidence that the defendant was involved in a robbery and a shooting that occurred after the crimes for which he was on trial was harmless in light of the other evidence of his guilt); *Deloney v. State*, 938 N.E.2d 724, 730 (Ind. Ct. App. 2010) (even though the trial court abused its discretion by admitting DNA evidence and corresponding testimony, the error was harmless in light of the evidence that the defendant had bragged on multiple occasions about his involvement in the crime, was seen near the scene of the crime on the night of the crime, and had stopped calling the cell phone his codefendant had dropped at the

crime scene), *reh'g denied*, *trans. denied*. In the face of the strength of this evidence, this Court should affirm Defendant's murder conviction.

III.
The trial court properly refused to instruct the jury, and properly limited Defendant's closing argument, on assisting a criminal as a lesser-included offense of murder.

The trial court properly refused to instruct the jury on assisting a criminal because it was not a factually lesser-included offense of murder as charged. "The purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001) (internal quotation marks omitted). Two of Defendant's issues are related to this issue, and each are addressed below (Defendant's Issues III and IV).

A. The trial court properly refused an assisting a criminal instruction (Defendant's Issue III).

When it comes to the question of instructing the jury regarding a lesser-included offense, our Supreme Court has developed a three-part test for trial courts to perform. *Webb v. State*, 963 N.E.2d 1103, 1106 (Ind. 2012). 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. *Wright v. State*, 658 N.E.2d 563, 566 (Ind. 1995). To determine whether a lesser-included offense is inherently included in a charged crime, the trial court compares the relevant statutes. *Id.*

Murder is the knowing or intentional killing of another human being. Ind. Code § 35-42-1-1(1). Assisting a criminal is defined by Indiana Code Section 35-44.1-2-5(a), which provides, in relevant part:

> 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 the other person, harbors, conceals, or otherwise assists the person commits assisting a criminal, a Class A misdemeanor.[2]

The assisting a criminal statute is intended to apply to people who did not actively participate in the crime itself, but who did assist a criminal after he or she committed a crime. *Hauk v. State*, 729 N.E.2d 994, 999 (Ind. 2000).

Our Supreme Court has determined that assisting a criminal is not an inherently lesser-included offense of murder. *Id*.; *Sturgeon v. State*, 719 N.E.2d 1173, 1183 (Ind. 1999). A comparison of the statutory elements reveals several differences between the crime of murder and of assisting a criminal. *Id*. (citing *Wright v. State*, 690 N.E.2d 1098, 1108 (Ind. 1997) (holding that assisting a criminal is not an inherently included lesser offense of murder or felony murder), *reh'g denied*). That is because a person can kill another human being without assisting another person in avoiding detection and arrest. *Wright*, 690 N.E.2d at 1108. Defendant agreed at trial that assisting a criminal is not inherently included in the offense of murder, and he asserted that he was not asking for this instruction as a "verdict;" rather, he just wanted the jury to be "aware of it" (Tr. Vol. II 221-25). In

[2] Assisting a criminal is a Level 5 felony if the person assisted has committed murder. I.C. § 35-44.1-2-5(a)(2).

this way, Defendant conceded the very argument he makes on appeal (Appellant's brief at 30).

If a trial court determines that an alleged lesser included offense is not inherently included in the crime charged under step one, then the second step is to determine if the alleged lesser included offense is factually included in the crime charged. *Webb*, 963 N.E.2d at 1106; *Wright*, 658 N.E.2d at 566. To make this determination, this Court compares the charging instrument in the specific case with the statute defining the alleged lesser-included offense. *Wright*, 658 N.E.2d at 567. If the charging instrument alleges that the means used to commit the crime charged include all the elements of the alleged lesser-included offense, then the alleged lesser-included offense is factually included in the crime charged, and this Court must proceed to step three of the *Wright* analysis. *Hauk*, 729 N.E.2d at 1000.

The murder charge provided:

> … On or about the 10th day of May, 2021, in the County of Allen and 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 …

(App. Vol. II 25). As noted above, Indiana Code Section 35-44.1-2-5(a) provides that the offense of assisting a criminal involves assisting another person, the one who has committed the actual crime, in harboring or concealing evidence of that crime. Nothing in the charge of murder in this case identified the "assisting" element of the offense of assisting a criminal. To have created a factually-included offense, the State would have had to allege that Smith or Ari committed the murder, and that

Defendant merely assisted Smith or Ari by covering up or avoiding apprehension. *See Hauk*, 729 N.E.2d at 1000. That was not how Defendant was charged with murder; he was charged as an accomplice to the murder with Smith and Ari. *See Sturgeon*, 719 N.E.2d at 1184 (rejecting assisting a criminal lesser-included instruction even when the defendant was charged under an accomplice liability theory); *Hauk*, 729 N.E.2d at 1000 (same). Defendant's entire argument on this score, that his defense was that assisting a criminal was "more applicable" to his conduct than murder, is unpersuasive under the *Wright* analysis (Appellant's brief at 30).

The law is clear that 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. *Wright*, 658 N.E.2d at 567. The trial court properly rejected the proffered assisting a criminal instruction.

B. The trial court properly refused Defendant's request to argue that offense in closing argument (Defendant's Issue IV).

On a related note, the trial court also properly rejected Defendant's request to argue assisting a criminal as an uncharged crime in closing argument (Tr. Vol. II 225). Although a trial court may not prevent a defendant from making a closing argument entirely, the court does have discretion to place reasonable limits on the scope of argument to prevent counsel from confusing or misleading the jury or "stray[ing] too far from the mark." *See Herring v. New York*, 422 U.S. 853, 862 (1975); *Nelson v. State*, 792 N.E.2d 588, 591 (Ind. Ct. App. 2003); *Buzzell v. State*, 636 N.E.2d 158, 159 (Ind. Ct. App. 1994); *Taylor v. State*, 457 N.E.2d 594, 599 (Ind.

Ct. App. 1983). "It is well-settled that the proper scope of final argument is within the trial court's sound discretion." *Taylor*, 457 N.E.2d at 599. In seeking a reversal of a conviction, the defendant must establish that the limitation on his argument was "clearly prejudicial" to his rights. *Nelson*, 792 N.E.2d at 591-92.

Although not entirely clear, Defendant appeared to request that he be allowed to argue that assisting a criminal is an offense but one that was not charged (Tr. Vol. II 225). Counsel may not argue a theory unsupported by the evidence. *Buzzell*, 636 N.E.2d at 159. First, whether Defendant committed assisting a criminal was not his main defense based on the evidence that he presented at trial, nor would that evidence have supported that uncharged offense. Defendant testified that he helped Smith in killing Ferris by carrying her body to the bathtub under threat of gunpoint (Tr. Vol. II 194-95, 197, 200). As noted above, assisting a criminal was intended to apply to people who *did not* actively participate in the crime itself, but who assisted a criminal *after* he or she committed a crime. *Hauk*, 729 N.E.2d at 999. By Defendant's own admission, he actively participated in the murder itself. And Defendant denied doing any of the things to assist Smith after the fact, like cleaning up and throwing away evidence (Tr. Vol. II 195-96, 201-02, 206). The actual evidence did not fit within the offense of assisting a criminal, so any argument in that regard would have confused the jury.

Further, interjection of a secondary defense—that he committed an uncharged offense, even if it was supported by the evidence—was an incorrect statement of law and, as such, it was not a valid "defense" that Defendant was

entitled to present to the jury. It is well-established that where two or more statutes are applicable to the conduct, the State has discretion to decide under which statute or statutes to bring charges. *State v. Dugan*, 793 N.E.2d 1034, 1039 (Ind. 2003); *Skinner v. State*, 732 N.E.2d 235, 237-38 (Ind. Ct. App. 2000), *summarily aff'd*, 736 N.E.2d 1222, 1222 (Ind. 2000); *Comer v. State*, 428 N.E.2d 48, 54-55 (Ind. Ct. App. 1981) (citing *United States v. Batchelder*, 442 U.S. 114, 123-25 (1979)); *Beech v. State*, 162 Ind. App. 287, 296, 319 N.E.2d 678, 683-84 (1974). Thus, even if Defendant's conduct fell within the assisting a criminal statute, which it did not, the prosecutor was allowed to proceed under the murder statute; it would be improper, misleading, and confusing for Defendant to suggest otherwise to the jury, as the trial court found (Tr. Vol. II 225). It is not a "defense" to murder to claim that he only assisted in committing it, so the trial court did not prevent Defendant from arguing a valid theory of defense to the jury. The jury was allowed to return a conviction for murder regardless of whether Defendant's conduct also satisfied a different, more lenient statute. *See generally Hoosier Home Theater, Inc. v. Adkins*, 595 F. Supp. 389, 397 (S.D. Ind. 1984); *Porter County Cable Co., Inc. v. Moyer*, 624 F. Supp. 1, 4-5 (N.D. Ind. 1983).

A trial court does not abuse its discretion by refusing to allow an attorney to mislead the jury regarding the law or argue that the jury should disregard the law. *See also Holden v. State*, 788 N.E.2d 1253, 1254-55 (Ind. 2003) (holding that, although the jury has the right to determine the law, it does not have the right to disregard the law). The only issue before the jury was whether the evidence had

proven that Defendant committed the elements of murder. It was proper for the trial court to limit the scope of closing argument to matters that were relevant to that issue, as the trial court ruled (Tr. Vol. II 224-25). Whether Defendant's conduct also constituted another offense was not relevant to the issue of whether his conduct constituted murder, and it would have only confused and misled the jury for Defendant to suggest that the jury needed to consider another offense (Tr. Vol. II 224-25).[3]

Furthermore, before a conviction will be reversed based on a limitation on closing argument, the defendant must establish that the limitation on his argument was "clearly prejudicial" to his rights. *Nelson*, 792 N.E.2d at 591-92. Defendant makes no argument to show prejudice (Appellant's brief at 32). Defendant argued that Smith killed Ferris, and Defendant assisted under duress (Tr. Vol. II 245-50; III 2-9). Defendant had no right to suggest to the jury that there was a legal impediment, apart from the sufficiency of the evidence, to convict him of murder under these circumstances. The evidence of Defendant's guilt was overwhelming, as argued in Issue VI. The jury found Defendant guilty beyond a reasonable doubt,

[3] Defendant's unarticulated reliance on *Taylor* is misplaced (Appellant's brief at 32). In *Taylor*, the defendant was charged with reckless driving, and he wanted to discuss the concept of negligence in his closing argument to help the jury understand the difference between acting recklessly and merely acting negligently. *Taylor*, 457 N.E.2d at 599-600. In other words, the defendant was discussing an uncharged degree of culpability to help define what was necessary to constitute the charged level of culpability. This case is also distinguishable from *Dixie*, where the evidence arguably supported the uncharged offenses of utility fraud or criminal deception, and the defendant was precluded from offering those as a theory of defense in closing argument. *Dixie*, 956 N.E.2d at 782-83. Neither of those situations was present here.

and Defendant cannot make any legitimate argument as to why that verdict would have been different had he been able to discuss another uncharged statute that clearly did not apply to his conduct. This Court should affirm Defendant's murder conviction.

IV.
The trial court properly refused to admit evidence that a witness died by suicide.

The trial court properly admitted evidence that Ari was deceased at the time of trial but excluded evidence that she died by suicide. This Court reviews the admission of evidence for abuse of discretion. *McCallister v. State*, 91 N.E.3d 554, 561 (Ind. 2018). "We will reverse only if the trial court's ruling was clearly against the logic and effect of the facts and circumstances before it." *Id.* (quoting *Knapp v. State*, 9 N.E.3d 1274, 1281 (Ind. 2014)).

At trial, Defendant did not object to the jury being informed that Ari had died, which explained her absence as a witness (Tr. Vol. I 5-7). He only objected to the exclusion of the fact that she died by suicide (Tr. Vol. I 5-7). Defendant's argument on appeal, questioning why her death was relevant evidence, has been waived. Further, the failure to object at trial results in a waiver of the issue on appeal. *Benson v. State*, 762 N.E.2d 748, 756 (Ind. 2002). When the jury was informed of Ari's death through Detective Cline, Defendant did not object to the fact that the jury was not also informed that it was by suicide (Tr. Vol. I 243). Defendant has thus waived this issue.

As the trial court found, it would have been prejudicial to the State to not inform the jury why Ari was not testifying at trial, as it would have invited speculation. *See Palilonis v. State*, 970 N.E.2d 713, 726 (Ind. Ct. App. 2012) (finding that not giving the jury any information as to why a witness was not testifying would be prejudicial to the State). Ari was an alleged accomplice, and the evidence showed that she was present at the time of Ferris's murder (App. Vol. II 25; Tr. Vol. I192-95; II 192-95). Her absence at trial would have caused speculation by and confusion for the jury.

But the fact that Ari died by suicide would have been, contrary to Defendant's argument below and on appeal, very prejudicial to him. *See id*. (finding that informing the jury that the witness had committed suicide would have been prejudicial to the defendant); *Warrick v. State*, 538 N.E.2d 952, 956 (Ind. Ct. App. 1989) (finding that the State appropriately elicited testimony to show that a witness was deceased, but it was inappropriate to introduce evidence that the witness had committed suicide). Evidence of her suicide would have suggested that Ari had overwhelming feelings of guilt in her participation in killing Ferris with Defendant. It would not have resulted in "no speculation," but only speculation prejudicial to Defendant. The trial court here, like that in *Palilonis*, 970 N.E.2d at 726, "acted in the best interest of both parties" by informing the jury why Ari would not be testifying but not informing the jury that she committed suicide. *Palilonis*, 970 N.E.2d at 726. Defendant thus received "even handed" treatment of this issue.

Defendant's sole citation to authority, *Stephenson v. State*, 29 N.E.3d 111 (Ind. 2015), is distinguishable. In *Stephenson*, the defendant sought the exclusion of evidence of his own suicide attempt as evidence of motive; the Court found the evidence was admissible for that purpose. *Id.* at 119-120. That case does not support Defendant's argument that Ari's suicide should have been admitted for "the whole truth" (Appellant's brief at 35).

Defendant also fails to show prejudice. Errors in the admission or exclusion of evidence are to be disregarded as harmless error unless they affect the substantial rights of a party. *Barnhart v. State*, 15 N.E.3d 138, 143 (Ind. Ct. App. 2014). This Court will find an error in the exclusion of evidence harmless if its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect the defendant's substantial rights. *Id.* The exclusion of how Ari died had no probable impact on the jury's decision that Defendant murdered Ferris because, as argued below, the evidence was overwhelming. This Court should affirm Defendant's murder conviction.

V.
Fundamental error did not occur by the manner in which the trial court instructed the jury on accomplice liability.

Defendant offered "no objection" to the accomplice liability instructions, nor did he tender any (App. Vol. II 80-83, 170-71; Tr. Vol. II 218-19), so he must show fundamental error. *See Paul v. State*, 189 N.e.2d 1146, 1159 (Ind Ct. App. 2022), *trans. denied*; *Halliburton*, 1 N.E.3d at 678); Ind. Criminal Rule 8(B). When determining whether an incorrect jury instruction amounts to fundamental error,

this Court looks not to the erroneous instruction in isolation, but in the context of all relevant information given to the jury, including closing argument and other instructions. *McKinley v. State*, 45 N.E.3d 25, 28 (Ind. Ct. App. 2015), *trans. denied*. There is no resulting due process violation where all such information, considered as a whole, does not mislead the jury as to a correct understanding of the law. *Id.* at 28-29.

As noted above, the purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict. *Dill*, 741 N.E.2d at 1232. Under the accomplice liability statute, a person "who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense." Ind. Code § 35-41-2-4 (1998). To find Defendant guilty of Ferris's murder under an accomplice liability theory, the jury must have found that Defendant knowingly and intentionally aided, induced, or caused Smith and/or Ari to commit the murder.

The elements instruction provided:

> The crime of Murder is defined by law as follows:
>
> A person who knowingly or intentionally kills another human being, commits Murder, a felony.
>
> Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:
>
> 1. The Defendant, Ajaylan M. Shabazz, while acting in concert with Terry Smith Jr. and/or Ariona Darling,
>
> 2. knowingly or intentionally,

3. killed,

4. Tiffany Farris.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty.

If the State did prove each of these elements beyond a reasonable doubt, you may find the Defendant guilty of Murder, a felony.

(App. Vol. II 163). The accomplice liability instructions provided:

Accomplice liability is defined by statute as follows:

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

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

and

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 a 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 170-71). This Court considers jury instructions as a whole and in reference to each other, not in isolation. *Murray v. State*, 798 N.E.2d 895, 900 (Ind. Ct. App. 2003). Defendant's two claims of omission are meritless.

A. The jury did not need a definition of "acting in concert," and Defendant waived any challenge to the charging information.

Defendant provides no authority for the proposition that the jury must be instructed on a definition of "acting in concert" (Appellant's brief at 38). In *Paul*, this Court found no fundamental error from the absence of an "acting in concert" definition when the jury was given the very same accomplice liability instructions given here (App. Vol. II 163, 170-71). *Paul*, 189 N.E.2d at 1160. This was because "the instructions, when taken as a whole rather than in isolation, contain the pertinent language regarding accomplice liability to instruct the jury." *Id.*

Moreover, the jury is expected to rely on its collective common sense and knowledge acquired through everyday experiences, but the trial court has a duty to define for the jury words of a technical or legal meaning normally not understood by jurors unversed in the law. *Yeary v. State*, 186 N.E.3d 662, 680 (Ind. Ct. App. 2022). The term "acting in concert" does not have a technical or legal definition different from its plain and ordinary meaning; therefore, there was no need for the trial court to define it. No error occurred here.

As to Defendant's challenge to the manner in which he was charged with murder, Defendant did not move to dismiss that charge under Indiana Code Section 35-34-1-4. It is well settled that the proper method to challenge deficiencies in a charging information is to file a motion to dismiss the information, no later than

twenty days before the omnibus date. *Milo v. State*, 137 N.E.3d 995, 1003 (Ind. Ct. App. 2019) (citing I.C. § 35-34-1-4(b)(1)), *trans. denied*. Any claimed defect in the information is therefore waived. *See Id*. (citing *Truax v. State*, 856 N.E.2d 116, 123 (Ind. Ct. App. 2006) (holding that, because the defendant did not raise his challenge to the charging information until after the omnibus date, his argument that the information was defective was waived)). Defendant waived this issue.

B. The jury was properly instructed on voluntary conduct.

Defendant provides no authority for the proposition that the jury must be separately instructed that his conduct must have been voluntary (Appellant's brief at 37). In *Small v. State*, 531 N.E.2d 498, 499 (Ind. 1988), our Supreme Court found an accomplice liability instruction erroneous where the sole instruction given did not satisfy the basic requirement of proof of voluntary conduct and allowed the defendant to be convicted of a shooting, without any regard to whether that shooting occurred while the defendant was acting in concert with others.

The accomplice liability instruction here did not suggest that Defendant could be convicted of murdering Ferris based on the actions of Smith and/or Ari without regard to whether Defendant was acting in concert with them. Rather, the instruction provided that Defendant could only be convicted of murder under a theory of accomplice liability if the State proved beyond a reasonable doubt that he knowingly or intentionally aided, induced, or caused Smith and/or Ari to commit the offense (App. Vol. II 163, 170-71). The instruction also reiterated that merely being present at the scene of the crime or failing to oppose the commission of the crime

are insufficient bases for a conviction (App. Vol. 171). These instructions sufficiently conveyed that Defendant's conduct must have been voluntary. *See Carter v. State*, 766 N.E.2d 377, 383 (Ind. 2002); *Brooks v. State*, 895 N.E.2d 130, 134 (Ind. Ct. App. 2008). No error occurred, and this Court should affirm Defendant's murder conviction.

VI.
The evidence was sufficient to support Defendant's murder conviction.

The jury had ample evidence to find Defendant guilty of murdering Ferris. When reviewing sufficiency claims, this Court does not assess witness credibility or reweigh the evidence and considers only the probative evidence supporting the verdict and reasonable inferences therefrom. *Scott v. State*, 139 N.E.3d 1148, 1155 (Ind. Ct. App. 2020) (citing *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007)), *trans. denied*. When confronted with conflicting evidence, this Court considers it in a light most favorable to the verdict and affirms the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* (quoting *Drane*, 867 N.E.2d at 146). "The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Drane*, 867 N.E.2d at 147. It is not necessary that the evidence overcome every reasonable hypothesis of innocence; the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.* at 146-47.

Defendant was charged with Ferris's murder for knowingly or intentionally killing Ferris "while acting in concert with Terry Smith Jr. and/or Ariona Darling" (App. Vol. II 25). Murder is the knowing or intentional killing of another human

being. Ind. Code § 35-42-1-1(1). The evidence at trial showed that Defendant and Ari beat Ferris, carried her into the bathtub, and then killed her (either with or without Smith) by drowning her (Tr. Vol. II 190-94, 208, 215; II 21-33, 194-95; State's Ex. 28-42). Defendant's shoes bore Ferris's DNA, he admitted to Blair that he killed Ferris, he threatened to kill Blair and Jones if they talked, and he tried to convince Smith to blame Ari for the murder after Ari died (Tr. Vol. I 139, 142, 145; II 86, 107-08, 119, 121, 164-71, 213; State's Ex. 170-71, 204, 217). An accomplice is equally as culpable as the one who commits the actual crime. *Hauk*, 729 N.E.2d at 998 (finding sufficient evidence under accomplice liability for murder when the defendant stole money from the victim, observed his brutal murder, and fled the crime scene to dispose of one of the murder weapons). The evidence against Defendant was overwhelming.

Defendant's claim that the jury verdict was the product of the "jury's emotional and visceral reaction" to Ferris's murder is unsupported by the record and ignores his presence at the scene, his participation in Ferris's beating and death, his attempt to discard evidence linking him to Ferris's murder, and his admissions to others that he killed Ferris (Appellant's brief at 40).

Defendant's attack on Smith's credibility is unpersuasive. The jury heard evidence of Smith's plea agreement and heard him disavow responsibility for committing aggravated battery, the charge he pled guilty to (Tr. Vol. I 205-06; State's Ex. 12). The jury assessed his credibility with this information, and this Court will not override that determination. *See Scott*, 139 N.E.3d at 1155.

Defendant's claim that Smith contradicted himself is unfounded in the record (Appellant's brief at 41). Smith testified on direct examination that Ferris's head hit the corner of the dresser as Defendant slammed her body to the floor (Tr. Vol. I 191). On cross-examination, Defendant asked if he had "smashed" Ferris's head into the dresser, and Smith said no (Tr. Vol. I 208-09). Smith explained on re-direct that Ferris's head hit the dresser in the process of Defendant slamming her, but that Defendant did not slam her head into the dresser (Tr. Vol. I 215). This was not contradictory testimony; it was testimony on two different theories on how Ferris's head hit the dresser. At no point did Smith deny seeing Defendant pick up Ferris and slam her to the ground, with her head hitting the corner of the dresser as this occurred.

As to Defendant's claim of duress, he was not entitled to an instruction on that defense, so he could suffer no harm from the jury's rejection of it (App. Vol. II 172). Indiana Code Section 35-41-3-8 provides for the defense of duress, but it is inapplicable to an offense against the person as defined in IC 35-42. Murder is an offense against the person as defined in Indiana Code Section 35-42-1-1. *Tobar v. State*, 740 N.E.2d 109, 111 n.1 (Ind. 2000) (noting that the "Indiana Code also explicitly forbids the use of duress as a defense to an offense against the person, including murder" and finding that the trial court properly refused the instruction to the murder charge); *Bethel v. State*, 110 N.E.3d 444, 450 (Ind. Ct. App. 2018) (noting the limitations on the defense of duress and that it did not apply to robbery, attempted robbery, and attempted murder, crimes against the person), *trans.*

denied. Defendant's claim of duress was not available to the murder charge. This Court should affirm Defendant's murder conviction.

CONCLUSION

This Court should affirm the trial court's judgment.

Respectfully submitted,

THEODORE E. ROKITA
Indiana Attorney General
Attorney No. 18857-49

/s/ *Jodi Kathryn Stein*
JODI KATHRYN STEIN
Deputy Attorney General
Attorney No. 16849-49

Counsel for Appellee

CERTIFICATE OF WORD COUNT

I verify that this Brief, including footnotes, contains no more than 14,000 words according to the word count function of the Microsoft Word word-processing program used to prepare this brief.

/s/ Jodi Kathryn Stein
Jodi Kathryn Stein

CERTIFICATE OF SERVICE

I certify that on October 22, 2024, I electronically filed the foregoing using the Indiana Electronic Filing System (IEFS), and that on the same date the foregoing document was served upon counsel via IEFS.

Gregory Fumarolo
Foom225@gmail.com

/s/ *Jodi Kathryn Stein*
JODI KATHRYN STEIN
Deputy Attorney General

OFFICE OF INDIANA ATTORNEY GENERAL TODD ROKITA
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6249
Facsimile: (317) 232-7979
E-mail: Jodi.Stein@atg.in.gov