

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

PETITION TO TRANSFER

GREGORY L. FUMAROLO
Attorney No. 7942-02
Lincoln Tower, Suite 500
116 East Berry Street
Fort Wayne, IN 46802
(260) 426-6336

QUESTIONS PRESENTED ON TRANSFER

Pursuant to Rules 56 and 57 of the Indiana Rules of Appellate Procedure, Ajaylan M.

Shabazz seeks transfer to the Indiana Supreme Court on the following questions:

- 1) Whether the Court of Appeals erred in affirming the trial court's decision to permit a State's witness to testify via Zoom from the Indiana Department of Correction?
- 2)
 - (a) Whether the Court of Appeals erred in affirming the trial court's decision to deny the defense's request for a jury instruction on assisting a criminal as a Level 5 felony?
 - (b) Whether the Court of Appeals erred in affirming the trial court's decision to prohibit 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?
- 3) Whether the Court of Appeals erred in affirming the trial court's decision to allow 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?
- 4) Whether sufficient evidence was presented to support Shabazz's conviction for murder?

TABLE OF CONTENTS

	<u>Page</u>
COVER PAGE	1
QUESTIONS PRESENTED ON TRANSFER.	2
TABLE OF CONTENTS	3
BACKGROUND AND PRIOR TREATMENT OF ISSUES PRESENTED ON TRANSFER ..	4
ARGUMENT	8
1) The Court of Appeals erred in affirming the trial court's decision to permit a State's witness to testify via Zoom from the Indiana Department of Correction	8
2) (a) The Court of Appeals erred in affirming the trial court's decision to deny the defense's request for a jury instruction on assisting a criminal as a Level 5 felony	10
(b) The Court of Appeals erred in affirming the trial court's decision to prohibit 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.	12
3) The Court of Appeals erred in affirming the trial court's decision to allow 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	13
4) The evidence presented was insufficient to support Shabazz's conviction for murder	14
CONCLUSION.	16
WORD COUNT CERTIFICATE.	16
CERTIFICATE OF SERVICE	16

**BACKGROUND AND PRIOR TREATMENT OF
ISSUES PRESENTED ON TRANSFER**

Background

In May 2021, Ajaylan Shabazz, Tiffany Ferris, Ariona Darling, and Dustin Blair expropriated a motel room used for storage in the Fort Wayne Suburban Inn unbeknownst to the management of the motel. The “filthy” and cluttered room was accessed through a window and served the dual purposes of providing the individuals with shelter and a place to use drugs. (*see Opinion [hereinafter Op.] ¶ 3*).

Around 11:30 p.m. on May 9, 2021, Shabazz and Darling walked to a Shell gas station near the Suburban Inn. While Darling was in the convenience store, Shabazz encountered Terry Smith outside. Smith, who Shabazz did not know, asked about Darling’s “availability.” Shabazz indicated she was not available because she was his fiancé. The conversation then turned to drugs, and Shabazz and Smith discussed trading drugs they each possessed or could secure. The couple got into Smith’s pickup truck and Smith drove them back to the Suburban Inn. (*see Op. ¶ 4*).

Once there, Shabazz, Darling, and Smith entered through the window into the room and saw Ferris and Blair. At the time, Blair was withdrawing from crystal methamphetamine and Ferris was withdrawing from fentanyl. Blair had only known Shabazz and Darling for a short time and felt “awkward” about the situation, so he left the motel room. When he left, Ferris was uninjured and sleeping in a chair. He walked to a nearby Shell gas station where his sister-in-law worked, and she allowed him to sleep in her car for a while. Around this time, Shabazz also left the motel room. (*see Op. ¶ 5*).

Petition to Transfer Ajaylan M. Shabazz

While Shabazz was gone, Darling accused Ferris of stealing her drugs. When Ferris denied it, Darling became angry and began beat Ferris and made Ferris strip so that she could search her for the allegedly stolen drugs. At some point during her tirade, Darling messaged Shabazz who returned to the room to find Darling “[o]ut of control” and “beating on” Ferris. According to Shabazz, it was Smith and Darling who continued to batter Ferris. According to Smith, Shabazz picked up Ferris, who was approximately 100 pounds, and slammed her to the floor, striking her head on the corner of a dresser in the process. (*see Op.* ¶ 6).

Shabazz and Darling picked up Ferris, who was still alive, and carried her to the bathrhub. Smith briefly left the room to go to the store, and when he returned, he went into the bathroom and saw Ferris naked and dead in the bathtub with blood coming from her face and head. Medical evidence later showed that Ferris had died from “drowning in a manner consistent with homicide,” and there was evidence of blunt force trauma to her head consistent with being punched or kicked. (*see Op.* ¶ 7).

Shabazz and Darling removed some carpet and other evidence from the room, and Smith drove them to a nearby hotel where they disposed of the evidence in dumpsters. Later that same morning, Blair walked back to the storage room at the Suburban Inn and discovered Ferris’s lifeless body in the bathtub. He then returned to the Shell station to contact the authorities. (*see Op.* ¶ 8).

After disposing of the evidence, Shabazz, Darling, and Smith hatched a plan to rob Henry Wright, an acquaintance of Shabazz and Darling. Darling contacted Wright and asked if they could stop by his residence at the Hawthorne Suites. After Wright let the three of them inside the residence, they robbed him at gunpoint. During the robbery, Shabazz switched shoes with Wright and left his

Petition to Transfer Ajaylan M. Shabazz

own bloodstained shoes behind. Testing later revealed Ferris's DNA was present on Shabazz's discarded shoes. After the robbery, Smith drove Shabazz and Darling to Indianapolis, where they were all arrested two days later. (*see Op.* ¶ 9).

On November 1, 2021, the State charged Shabazz with murder under an accomplice liability theory. While in custody, Shabazz admitted to another inmate, Miquan Jones, that he killed Ferris. By the time Shabazz was tried for murder in February 2024, Jones had been moved to a Department of Corrections facility four hours from Fort Wayne. The State requested Jones be permitted to testify from the DOC because the Sheriff did not have the resources to bring Jones to testify in person. The trial court granted the State's request over Shabazz's objection. The parties also argued to the trial court whether the jury should be allowed to hear that Darling died by committing suicide while in jail. The trial court allowed the parties to tell the jury that she had died, but not how she died. (*see Op.* ¶ 10, 11).

During the trial, the trial court allowed evidence of Shabazz's involvement with the robbery of Wright's residence. The trial court declined to give a jury instruction on assisting a criminal as a lesser included offense to murder and did not permit defense counsel to argue in their closing statement that Shabazz should have been charged with assisting a criminal. Following the four-day trial, the jury found Shabazz guilty of murder. The trial court later entered judgment of conviction and sentence Shabazz to an executed term of sixty-three years in the DOC. (*see Op.* ¶ 13).

Prior Treatment

On appeal, Shabazz argued that the trial court erred by allowing Jones to testify via Zoom because the State failed to show good cause to conduct the testimonial proceeding remotely in accordance with Interim Administrative Rule 14(c), and in violation of Shabazz's right to confront

Petition to Transfer Ajaylan M. Shabazz

under the 6th Amendment to the United States Constitution, and Article 1 § 13 of the Indiana Constitution. The majority held that the trial court's finding of good cause to allow Jones's remote testimony was supported by the record. However, Judge Tavitias dissented and issued a separate opinion agreeing with Shabazz that allowing the remote testimony was error. Judge Tavitias, however, concurred with the majority in result, finding that the error was harmless beyond a reasonable doubt.

Shabazz also argued on appeal (1) that the trial court erred in refusing to instruct the jury on assisting a criminal as a lesser included offense of murder and (2) that the trial court abused its discretion in not allowing Shabazz's defense counsel to claim in his closing argument that he may have committed assisting a criminal. The Court of Appeals concluded that assisting a criminal was not factually included in the crime charged and, therefore, the trial court properly declined to instruct the jury. Additionally, the Court of Appeals found no abuse of discretion in the limitation that the trial court placed on Shabazz's closing argument.

Further, the Court of Appeals found no error in allowing the State to control the narrative by informing the jury that Darling was deceased, but preventing the defense to inform the jury that her death was a suicide.

Lastly, Shabazz argued that the State presented insufficient evidence at trial to support his conviction for murder. The Court of Appeals indicated that Shabazz's sufficiency of the evidence argument was almost entirely a request to reweigh the evidence and the credibility of various witnesses which the Court stated it would not do.

NOTE: Shabazz raised two additional issues on appeal which issues involved the concept of "fundamental error". Shabazz explicitly does not request transfer on these issues.

ARGUMENT

- 1) The Court of Appeals erred in affirming the trial court's decision to permit a State's witness to testify via Zoom from the Indiana Department of Correction.**

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 allowing this testimony, Shabazz argued that his constitutional rights were violated as well as the law governing "remote proceedings" which exists to protect these rights.

In support of his argument, Shabazz provided a history of Administrative Rule 14, how it had been modified due to the COVID 19 pandemic, and coming out of the pandemic how remote proceedings – in appropriate cases and under appropriate circumstances – could provide an efficient and effective means of accessing the court system for litigants and lawyers.

The essential question was 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. On appeal, Shabazz set out the factors to be used to determine "good cause" as well as the in-court colloquy regarding the State's use of this Zoom testimony.

Petition to Transfer Ajaylan M. Shabazz

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. In applying those factors Shabazz argued that “good cause” was not shown. For example, there is no showing of due diligence on the part of the State. 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. Showing convenience to the State by not requiring that they use the normal method 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.

Despite this careful and detailed summary of the administrative rules, the citation to the confrontation clauses in both the federal and Indiana constitutions, and references to the record, itself, the majority opinion demeaned Shabazz’s argument as failing to “support his constitutional claims with applicable authorities and cogent reasoning as required ...” and ultimately found that

Petition to Transfer Ajaylan M. Shabazz

the trial court's finding of good cause was supported by the record. Fortunately, in a separate opinion, Judge Tavitaz agreed with the basis of Shabazz's argument, the conclusion that the State did not show good cause, and that the trial court erred in allowing Jones' testimony. Unfortunately, Judge Tavitaz ultimately concurred with the majority, finding that the error was "harmless" beyond a reasonable doubt.

While appreciating Judge Tavitaz' agreement with the analysis regarding Jones' remote testimony, Shabazz respectfully disagrees with the harmless error finding. This case had so many moving parts – three perpetrators, one of whom committed suicide before trial; the emotional, horrific nature of the offense, admission of 404 evidence; "drowning in a manner consistent with a homicide", etc. – it is difficult to believe that Jones' testimony was not a major factor in the jury's decision. Another way of assessing its importance is to ask the questions if the evidence was so clear, why would the State bother to call a jail house snitch? And why go to such extremes logistically to secure his testimony?

"Harmless error" should not be employed to cleanse a violation of an individual's right of confrontation protected under both the Indiana and United States Constitutions. Accordingly, Shabazz requests that this Court grant transfer and grant him a new trial.

2) (a) The Court of Appeals erred in affirming the trial court's decision to deny 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 ...

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 and the Court of Appeals agreed. (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).

Petition to Transfer Ajaylan M. Shabazz

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 that the Court of Appeals erred in affirming the trial court. Therefore, Shabazz requests that this Court vacate his conviction and grant him a new trial.

- (b) The Court of Appeals erred in affirming the trial court's decision to prohibit 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. Thereafter a colloquy on the matter was held as to whether Shabazz's lawyer could argue that Shabazz may have committed assisting a criminal. The trial court refused to allow defense counsel to do so and the Court of Appeals agreed that the trial court did not abuse its discretion in limiting the defense. (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 and the Court of Appeals erred in affirming the trial court. 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 and because the Court of Appeals affirmation of the trial court, Ajaylan Shabazz requests this Court grant transfer, reverse his conviction, and grant him a new trial.

- 3) **The Court of Appeals erred in affirming the trial court's decision to allow 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 was conducted with the trial court siding completely with the State. The Court of Appeals agreed and found no error in the trial court's decision.

So, the State was allowed to completely 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 grant transfer, reverse his conviction, and grant him a new trial.

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

Ajaylan Shabazz argued 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.

Petition to Transfer Ajaylan M. Shabazz

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 died from "drowning in a manner consistent with homicide."

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 herein, Ajaylan M. Shabazz respectfully requests that this Court grant transfer and find that his conviction for 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,

/s/ Gregory L. Fumarolo
Gregory L. Fumarolo
Attorney No. 7942-02
Lincoln Tower, Suite 500
115 East Berry Street
Fort Wayne, Indiana 46802
(260) 426-6336

WORD COUNT CERTIFICATE

Based upon my reliance on the word count of the word processing system used to prepare the foregoing, I verify that this brief contains less than 4,200 words.

/s/ Gregory L. Fumarolo
Gregory L. Fumarolo

CERTIFICATE OF SERVICE

I certify that the foregoing document was electronically filed using the Indiana E-filing System ("IEFS") on May 1, 2025. I also certify that on that same date, a true and exact copy of the foregoing was served by IEFS to Theodore Rokita, Attorney General of Indiana, and Jodi K. Stein, Deputy Attorney General.

/s/ Gregory L. Fumarolo
Gregory L. Fumarolo