

Case Summary

Khalid Jackson-Bey appeals his convictions for Murder, a felony,¹ and Robbery, as a Class B felony.² We affirm.

Issues

Jackson-Bey presents four issues for review:

- I. Whether the limiting instruction given after a witness refused to testify was so deficient as to constitute fundamental error;
- II. Whether an instruction advising the jury of the defendant's anticipated defense of insufficient evidence was fundamental error;
- III. Whether there is sufficient evidence to support the Murder conviction; and
- IV. Whether the sentence is inappropriate.

Facts and Procedural History

On November 16, 2007, Anthony Rias, Jr., Jamal Hillsman, Edgar Covington, Jermaine Hammonds, and Mrtyrone Metcalf visited with Jackson-Bey and his brother, Haneef, at the Jackson-Bey home. Rias asked the Jackson-Bey brothers and Metcalf if they wanted to “do a lick” (in street terms, commit a robbery). (Tr. 311.) The group of young men, excluding Haneef, left in Hillsman's blue Ford Explorer. Jackson-Bey was armed with a small silver gun. They picked up Jamil Pirant, and Rias and Jackson-Bey explained to him “about the lick.” (Tr. 314.) Metcalf inquired whether Pirant had a pistol; at first Pirant jokingly replied that he had left it behind but then assured Metcalf that he had the pistol.

The group proceeded to a White Castle, where Rias procured a loaner vehicle (a white

¹ Ind. Code § 35-42-1-1.

² Ind. Code § 35-42-5-1.

Ford Explorer) from one of his friends. Rias, Metcalf, Pirant, and Jackson-Bey drove off in the white Explorer, with Hillsman, Covington, and Hammonds following in the blue Explorer. Rias, who had been driving the white Explorer, stopped the vehicle in an alley. The three occupants of his vehicle went to the apartment of Dominique Keesee. The blue Explorer was parked nearby.

Keesee answered his door, and Jackson-Bey advised that he wanted to buy marijuana. Keesee agreed to the sale and went to get the marijuana; Metcalf and Pirant forced their way into the apartment. Jackson-Bey followed. Outside, Covington heard gunshots. Hammond exited the blue Explorer and began to run. Rias drove up to Hillsman's vehicle and directed him to follow so that the white Explorer could be hidden. Once the white Explorer was parked, Rias got into Hillsman's blue Explorer and they proceeded to the alley by Keesee's apartment. Jackson-Bey, Metcalf, and Pirant came running up to the vehicle with bags in hand.

With Hillsman, Rias, Jackson-Bey, Metcalf, Pirant, and Covington present, there was some discussion of the events that had transpired. Rias asked Jackson-Bey "is it done" and Jackson-Bey replied, "it is done." (Tr. 536.) Jackson-Bey indicated that Metcalf had shot Keesee in the chest and further stated, "We come to kill him." (Tr. 538.)

Dionne Austin found Keesee in his apartment, suffering from gunshot wounds to the head and chest.³ He had been shot approximately fifteen times, from two .22 caliber

³ At that time, Austin was romantically involved with Keesee, and owned the apartment where Keesee lived. Austin had previously been romantically involved with Rias's father, Anthony Rias, Sr.

weapons. Medical assistance to Keesee proved futile and he died. Meanwhile, Rias and Hillsman returned the white Explorer to its owner and Covington, Jackson-Bey, Metcalf and Pirant went back to the Jackson-Bey house. Haneef divided up the marijuana and some of the young men began to play a video game that had been stolen from Keesee.

Several months later, Jackson-Bey's attorney advised the Lake County Sheriff's Department that Jackson-Bey had information about Keesee's murder. Jackson-Bey gave a statement indicating that Rias and Hillsman were the "shooters" that had killed Keesee. (State's Ex. 64a, pg 3.) Subsequently, Jackson-Bey gave a statement identifying Metcalf and Pirant as the shooters. Ultimately, Jackson-Bey, Metcalf, and Rias were charged with Keesee's murder.

Hillsman was charged with assisting a criminal. Charges against Covington and Hammonds were also lodged, but then dismissed. Nonetheless, Hillsman, Covington, and Hammonds each agreed to testify regarding Keesee's murder. Haneef also agreed to testify. At trial, however, Haneef refused to testify against his brother.

The jury found Jackson-Bey guilty as charged.⁴ He was sentenced to fifty-five years for Murder, and ten years for Robbery, to be served consecutively. He now appeals.

Discussion and Decision

I. Limiting Instruction

At the outset of Jackson-Bey's trial, the prosecutor gave an opening statement in part

⁴ Jackson-Bey was charged with Murder, Felony Murder, and Robbery. The trial court entered a judgment of conviction only upon the Murder and Robbery counts.

describing Haneef’s anticipated testimony. Later, Haneef refused to testify and Jackson-Bey requested a limiting instruction “with regards to the questions that were asked of the witness which he refused to answer.” (Tr. 475.) The trial court obliged, instructing the jury as follows:

Haneef Jackson-Bey has refused to answer additional questions. Thereafter, the Court conducted a proceeding relative to that. You are to not [sic] infer, speculate, or in any other way try to make a determination as to what he would have testified to had he continued to give testimony. You’re only to consider what was testified to in open court.

(Tr. 477.) Jackson-Bey now contends that the instruction should have included a specific admonishment to disregard the prosecutor’s description of Haneef’s anticipated testimony. He couches his argument in terms of “fundamental error.”

“[F]undamental error is extremely narrow and available only when the record reveals a clearly blatant violation of basic and elementary principles, where the harm or potential for harm cannot be denied, and which violation is so prejudicial to the rights of the defendant as to make a fair trial impossible.” Jewell v. State, 887 N.E.2d 939, 942 (Ind. 2008). Here, the jury instruction given pursuant to Jackson-Bey’s request, and within the parameters he suggested, included no specific reference to opening statements. Nonetheless, the jury was told to consider only testimony in reaching its decision, necessarily excluding questions and comments of counsel. Jackson-Bey has demonstrated no error, much less fundamental error.

II. Preliminary Instruction 5

Without objection, the trial court gave Preliminary Instruction 5, providing:

To each count of the Information in this case, the Defendant has entered a plea of not guilty, which makes it incumbent upon the State of Indiana to prove

to your satisfaction beyond a reasonable doubt each and every material allegation of said Information constituting the particular crime charged.

The burden of proof in a criminal case is upon the State alone and it never shifts to the Defendant.

The defendant intends to introduce the defense of insufficiency of evidence.

(App. 42.) Jackson-Bey now argues that the instruction amounts to fundamental error, because the “troublesome language in the instruction would likely lead a reasonable juror to anticipate that Jackson-Bey was required to present evidence to establish a defense” but “Jackson-Bey did not testify.” Appellant’s Brief at 8.

As previously observed, the fundamental error rule is extremely narrow, applicable only when 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. Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002). To establish fundamental error based upon jury instruction, the appellant must show that there was erroneous instruction and that the incorrect instruction, in the context of all “relevant information given to the jury,” including closing argument and other instructions, caused him to suffer a due process violation. Id. “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.

Here, Preliminary Instruction 5 states unequivocally that the State bears the burden of proof and that it “never shifts to the Defendant.” (App. 42.) Preliminary Instruction 7 reiterates: “The burden is upon the State to prove beyond a reasonable doubt that the defendant is guilty of the crimes charged.” (App. 44.) Final Instruction 11 provides in

relevant part: “Since the Defendant is presumed to be innocent, he is not required to present any evidence to prove his innocence, or to prove or explain anything.” (App. 61.)

Taken as a whole, the instructions clearly place the burden of proof upon the State and none, preliminary or final, contain language stating or suggesting that Jackson-Bey is required to testify or to present evidence. The language in the challenged instruction referencing a “defense of insufficiency” adds nothing and could cause confusion to the jury; however, in light of the instructions as a whole, the superfluous language is merely harmless error.

III. Sufficiency of the Evidence

A. Standard of Review

Our Supreme Court has recently summarized our standard of review when assessing claims of insufficient evidence:

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court’s ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore 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.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

B. Analysis

Jackson-Bey argues that the evidence is insufficient to support his murder conviction because he intended only to obtain marijuana from Keesee and never intended to kill him. To convict Jackson-Bey of Murder, as charged, the State was required to establish that he knowingly or intentionally killed Dominique Keesee. Ind. Code § 35-42-1-1. A person engages in conduct “intentionally” if, when he engages in the conduct, it is his conscious objective to do so. Ind. Code § 35-41-2-2(a). A person engages in conduct “knowingly” if, when he engages in the conduct, he is aware of a high probability that he is doing so. Ind. Code § 35-41-2-2(b).

In Indiana, the responsibility of a principal actor and an accomplice is the same. Taylor v. State, 840 N.E.2d 324, 338 (Ind. 2006). One may be charged as a principal yet convicted upon proof that he aided another person in the commission of a crime. Id. Proof of mere presence at the scene of a crime or the failure to oppose a crime is insufficient to establish accomplice liability. Brooks v. State, 895 N.E.2d 130, 133 (Ind. Ct. App. 2008). However, companionship with another person engaged in the commission of the crime and a course of conduct before and after the offense are circumstances which may be considered. Garland v. State, 788 N.E.2d 425, 431 (Ind. 2003).

Here, the State presented evidence that Jackson-Bey was part of the planning session to “hit a lick” at a residence that had been “scoped out.” (Tr. 311, 526.) He was armed with a pistol, and knew that one of the others in the group was also armed. He accompanied Metcalf and Pirant to Keesee’s house and asked for marijuana. When Metcalf and Pirant

pushed their way inside the apartment, Jackson-Bey entered also. He remained while Keesee was shot fifteen times. He left after taking a security camera from the window, carrying a bag of items stolen from the victim. During the drive home, Jackson-Bey stated that Metcalf shot Keesee in the chest and added, “we come to kill him.” (Tr. 538.) There is sufficient evidence from which the factfinder could conclude that Jackson-Bey knowingly participated in Keesee’s murder.

IV. Sentence

Jackson-Bey contends that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). Too, although he does not develop a separate argument, Jackson-Bey asserts that the trial court erred in imposing consecutive sentences.

In Reid v. State, the Indiana Supreme Court reiterated the standard by which our state appellate courts independently review criminal sentences:

Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The burden is on the defendant to persuade us that his sentence is inappropriate.

876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted).

More recently, the Court reiterated that “sentencing is principally a discretionary function in which the trial court’s judgment should receive considerable deference.” Cardwell v. State, 895 N.E.2d 1219, 1222 (Ind. 2008). Indiana’s flexible sentencing scheme

allows trial courts to tailor an appropriate sentence to the circumstances presented. See id. at 1224. One purpose of appellate review is to attempt to “leaven the outliers.” Id. at 1225. “[W]hether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case.” Id. at 1224.

A person who commits murder has a sentencing range of between forty-five years and sixty-five years, with the advisory sentence being fifty-five years. Ind. Code § 35-50-2-3. A person who commits a Class B felony has a sentencing range of six to twenty years, with ten years as the advisory. Ind. Code § 35-50-2-5. Jackson-Bey received advisory sentences. When the trial court has imposed the advisory sentence, the appellant “bears a heavy burden in persuading us that his or her sentence is inappropriate.” McKinney v. State, 873 N.E.2d 630, 647 (Ind. Ct. App. 2007), trans. denied.

The nature of the offense is that Keesee was ambushed in his home and shot fifteen times, despite his pleas for his life. The character of the offender is such that Jackson-Bey had a significant history of arrests, beginning with an arrest for aggravated assault at age thirteen. Some of the charges lodged against Jackson-Bey in the State of Illinois culminated with his pleading guilty, but having judgment withheld pending the successful completion of a supervision period. He had been arrested on multiple robbery charges when he came forward with information in the instant case. We do not find that the nature of the offense and the character of the offender suggest sentences less than the advisory.

The decision to impose consecutive sentences generally lies within the discretion of the trial court. Gilliam v. State, 901 N.E.2d 72, 74 (Ind. Ct. App. 2009). A trial court is required to state its reasons for imposing consecutive sentences; however, a single aggravating circumstance may justify the imposition of consecutive sentences. Id. Here, the trial court stated that it had considered the fact that multiple crimes were committed, as well as Jackson-Bey's commission of batteries and reckless conduct in the State of Illinois. We conclude that the trial court did not err in imposing consecutive sentences.

Conclusion

Jackson-Bey has demonstrated no fundamental error. His murder conviction is supported by sufficient evidence. His aggregate sixty-five-year sentence is not inappropriate or contrary to law.

Affirmed.

BAKER, C.J., and ROBB, J., concur.