FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-0597

KENNETH DWAYNE BROWN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Alachua County.
David P. Kreider, Judge.

October 6, 2022

PER CURIAM.

A six-member jury convicted Kenneth Brown of armed robbery, kidnapping (three counts), conspiracy to commit robbery, and possession of a firearm as a felon—all as charged by the State. He was adjudicated and sentenced to serve the rest of his life in prison as a prison releasee reoffender on the robbery and kidnapping counts. He received concurrent fifteen-year sentences on the conspiracy and firearm counts. On appeal, Brown does not contest his sentence or his armed-robbery conviction. Regardless of our disposition in this case, then, Brown will die in prison, barring any post-conviction relief. That said, as to the claims of error he does purport to bring on appeal, none of them comes to us as properly preserved in the trial court. He cannot demonstrate fundamental error, so we affirm. *See Hamilton v. State*, 88 So. 2d

606, 607 (Fla. 1956) ("We do not consider an error to be of such fundamental nature as to justify a reversal in the absence of timely objection unless it reaches down into the legality of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the error alleged.").[1]

I

Brown does not challenge his armed-robbery conviction, so there can be no good-faith dispute that he participated in the following events proved by the State at trial. On February 13, 2019, Brown and Christopher Wiggins drove to the Bojangles on Archer Road in Gainesville. The men waited in the parking lot until just before 11:00pm, one hour after the restaurant closed. When they saw employees exiting the restaurant to leave for the night, the men donned masks, ran at the group,[2] and forced them back inside.

Once back inside the restaurant, Branton—who later confessed to being in on the heist—deactivated the building's alarm. The men ordered the group to turn over their phones. Wiggins then took the three women into the hallway by the

[1] We note without further discussion that Brown's claim that he was entitled to a twelve-member jury on these charges is without merit. *See* § 913.10, Fla. Stat. ("Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases."); *Gibson v. State*, 16 Fla. 291, 300 (1877) (finding that "a jury composed of six persons is a constitutional jury"); *Williams v. Florida*, 399 U.S. 78, 102 (1970) (observing "the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics'" and concluding that a twelve-person jury is not "indispensable" to the right to a trial by jury (internal quotations and citation omitted)).

[2] Four people were present in this group: (1) Arkenda Branton (an employee and, as it turns out, a co-conspirator); (2) Philip Blangor (the manager); (3) Shekia Thomas (an employee); and (4) Shemetria Thomas (not an employee, but Shekia's sister).

bathrooms and guarded them while Brown, armed with a stockless assault rifle, took the manager into the office where the safe was located. At Brown's direction, the manager opened the safe and transferred the contents (coin rolls and bills) into a box. Brown threatened to kill the manager if he did not hurry up. At some point, Wiggins left the group of women and used Branton's key to enter the office, where he began helping the manager load money into the box. The men then took the manager back into the hallway with the women, ordered them not to move or turn around, and fled the restaurant. The entire incident took five minutes and was captured on surveillance video.

II

Brown raises numerous issues in his initial brief. We address each in turn.

Kidnapping convictions

Because he was also charged with and convicted of armed robbery, Brown argues that his three kidnapping convictions do not pass the *Faison* test and are fundamentally erroneous.[3] In *Faison v. State*, the supreme court adopted Kansas's test for determining whether a defendant could be convicted of kidnapping, in addition to the primary offense, when the taking or confinement was alleged to have been done to facilitate the primary offense. 426 So. 2d 963, 965 (Fla. 1983) (citing *State v. Buggs*, 547 P.2d 720 (Kan. 1976)). The test requires the State to show that the defendant moved or confined the victim in a way that: (1) is not "slight, inconsequential and merely incidental to the other crime"; (2) is not "of the kind inherent in the nature of the other crime"; and (3) has "some significance independent of the other crime" by making the other crime substantially easier to commit or by substantially lowering the risk of detection. *Id*.

Although there are similarities between the cases cited in Brown's brief and this one, we are not persuaded that the trial

[3] Brown acknowledges that this issue was not preserved for appellate review via a motion for judgment of acquittal. *See Morales v. State*, 170 So. 3d 63 (Fla. 1st DCA 2015).

court erred by allowing Brown to be convicted on the three kidnapping counts in the absence of any objection. The salient fact in reaching this determination is that Brown and Wiggins forced the three victims back into the restaurant when they were in the process of exiting the building. Forcing the victims back inside was not slight, inconsequential, or merely incidental to the robbery, and it was totally unnecessary to the commission of the crime (especially given Branton's privileges as an employee). *See Faison*, 426 So. 2d at 965. Driving the victims back into the restaurant, temporarily taking their cellphones, and sequestering the women in the hallway for five minutes, all while moving the manager into the office at gunpoint, are actions not inherent to the nature of this type of robbery. Those actions did, however, make committing the robbery substantially easier and substantially lessened the risk of detection. *Id*. Therefore, under *Faison*, Brown was legally convicted of three counts of kidnapping (the Thomas sisters and the manager), in addition to his conviction on the armed-robbery count.

There was no error in the kidnapping convictions, so there was no *fundamental* error in the trial court's failure to enter a judgment of acquittal, unprompted by Brown's trial counsel. In turn, Brown's contention that he is entitled to relief on a claim here for ineffective assistance of counsel (stemming from trial counsel's failure to argue this issue in a motion for judgment of acquittal) goes nowhere. *See* § 924.051(3), Fla. Stat.; *Steiger v. State*, 328 So. 3d 926 (Fla. 2021).

Conspiracy to commit robbery conviction

Brown also argues the trial court erred in allowing Branton to testify, over counsel's timely objection, to the effect that Wiggins told her someone named "Kenneth" wanted to make some money and that they decided in turn to rob the Bojangles.

Florida's evidence code allows the State to elicit a co-conspirator's statement, provided the statement is offered against the defendant, "by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy." Fla. R. Evid. Code 90.803(18)(e). Prior to admitting a co-conspirator's statement, however, the State must show that a conspiracy existed, that the declarant and the party against whom the

statement is offered were members of the conspiracy, and that the statement was made during the course and in furtherance of the conspiracy. *State v. Edwards*, 536 So. 2d 288, 292 (Fla. 1st DCA 1988).

At trial, the State questioned Branton about conversations she had with Wiggins that implicated Brown. Counsel objected, and the following exchange occurred (with the statements implicating Brown highlighted):

> **STATE:** Approximately in relation to how much time before the robbery on February 13 did [Wiggins] begin these conversations with you?
>
> **BRANTON:** Like two days.
>
> **TRIAL COUNSEL:** Your Honor, I object. Any statements made by Mr. Wiggins in this particular case with regard to Mr. Brown is hearsay.
>
> **STATE:** Your Honor, I think they qualify under [90.803] as co-conspirators' statements, 18(e).
>
> **THE COURT:** All right, overruled.
>
> **STATE:** So a couple of days before you, Mr. Wiggins approaches you?
>
> **BRANTON:** Yes, sir.
>
> **STATE:** What does he ask you about the restaurant, what does he say?
>
> **BRANTON:** He asked me how much money do we bring in and what we have in the safe.
>
> **STATE:** Did you know the answer to that?
>
> **BRANTON:** Yes, sir.
>
> **STATE:** What did you tell him?

BRANTON: I told him the safe usually has $2,000 in it and whatever the night deposit is going to be at drop that night.

STATE: Did he ask any additional questions or say anything to you that lead you to believe that he wanted to engage in a robbery?

BRANTON: Yes, sir, he asked me and told me that he had a friend of his that wanted to make some money. *A guy named Kenneth needed some money and they wanted to rob the place.*

STATE: Did they talk, did Mr. Wiggins talk to you at all about the details of how the robbery would occur?

BRANTON: Yes, sir, he did say that they will rob the place with a gun. He say it wouldn't be anybody that got hurt but they were going to rob the place with a gun. *When I say they, he say him and Kenny.*

On appeal, the State agrees with Brown that his counsel's objection was sufficient to preserve the issue for our review. We disagree. "[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982). Although counsel objected generally as to hearsay, he did not mention the lack of prerequisite conspiracy findings. Because he failed to do so, appellate counsel's argument was not presented to the trial court and therefore must be analyzed under a fundamental error standard. *See Paul v. State*, 277 So. 3d 232, 238 (Fla. 1st DCA 2019) (explaining that because "counsel did not argue that the trial court failed to make any threshold findings for the co-conspirator hearsay exception to apply . . . . the argument was not preserved for appeal.").

As we noted at the beginning, fundamental error is error that "reaches down into the legality of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the error alleged." *Hamilton*, 88 So. 2d at 607. Although the trial court did not make threshold findings related to the existence of a conspiracy *prior* to admitting the co-conspirator's

statement, we have no doubt that the State could have presented evidence to support that threshold finding had Brown's counsel mentioned the need to do so. In turn, the outcome of the trial would have been the same regardless.

We say this because the State introduced ample evidence of a conspiracy through subsequent witnesses. Specifically, the State introduced evidence showing that in the days leading up to the robbery, Brown performed a voice search on his phone, stating: "show me the Draco" (the type of gun used in the robbery). The State also presented evidence that Branton and Wiggins were close friends for many years, and Brown and Wiggins were also friends for many years. The State further established that while Branton initially denied knowledge of the crime, she provided accurate identifying details that led police to Wiggins, and later confessed to her role in the robbery.

The jury also heard testimony and saw evidence regarding the events on the night of the robbery:

> (1) Brown's phone arrived at or near the Bojangles at 10:15pm;
>
> (2) Wiggins called Branton's phone at 10:16p.m., from either at or near the Bojangles;
>
> (3) Brown's phone remained at the same location (at or near the Bojangles) until 11:05pm[4];
>
> (4) Brown's phone then headed towards Archer and arrived either at or near Wiggins's house at 11:45pm;
>
> (5) Brown's phone began heading back towards Gainesville at 12:10am;
>
> (6) Calls were then exchanged between Brown's phone and Wiggins's phone; and

[4] Video surveillance footage from the Bojangles showed that the robbery began at 10:59pm and lasted for approximately five minutes.

(7) Wiggins and Branton communicated via text message.

If we consider all the testimony and other evidence that was admitted after Branton's statement regarding their plan, we do not see how the trial court's error in failing to require the State to make a *threshold* showing of a conspiracy *prior* to admitting Branton's testimony, pursuant to evidentiary rule 90.803(18)(e), vitiates the fairness of the trial or calls into doubt the validity of the result. In the light of this evidence, we also cannot say that the conspiracy conviction itself could be considered fundamentally erroneous. This is especially so given that Brown concedes for the purpose of this appeal that he participated in the armed robbery.

III

Finally, we note that while we address the merits of each issue raised by Brown on appeal separately, we do not review any of them in a vacuum. Perhaps his appellate counsel did not make an argument for reversal of the armed-robbery conviction because there was no good-faith argument to be made. Still, the failure to do so constitutes a forfeiture of Brown's right to contest the validity of that conviction, including the sufficiency of the evidence presented to support that conviction. This forfeiture on appeal regarding the primary offense makes any fundamental error claim regarding related convictions from the same trial much more difficult to sustain.

ROBERTS and TANENBAUM, JJ., concur; MAKAR, J., concurs in result only.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Jessica J. Yeary, Public Defender, and Ross S. Haine, II, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Sharon Traxler, Assistant Attorney General, Tallahassee, for Appellee.