

Jonathan L. Rhodes appeals his convictions for felony murder and class A felony robbery, alleging the evidence is insufficient.¹ We affirm the convictions for felony murder and remand with instructions to vacate Rhodes's robbery convictions.

The facts most favorable to the verdict follow.² On the evening of February 20, 2007, Rhodes was at Prentiss Fomby's apartment with a group of people: Theodore Johnson, Antwain Hines, Percy Riley, Derious Fuqua, Keneisha Eley, and Shaquela Hunter. Rhodes had a .45 Taurus handgun, Johnson carried a .38 revolver, and the absent Fomby owned a .44 magnum Desert Eagle handgun, which was on the dining room table.

Some people played video games and drank beer or tequila. Rhodes smoked marijuana. At some point, Johnson looked at Rhodes and made a statement to the effect that when the bullets get to flying, people better be on the right side. Johnson took his gun out of his pocket and asked Rhodes if he wanted to play Russian roulette. Before Rhodes could respond, other people told Johnson to put the gun away. Johnson pointed the gun at Eley and said, "Bam." Tr. at 152.

Later, Johnson announced that they were going to leave and patted the pocket that contained his gun. Hines nodded to him. Johnson walked to the bathroom. Eley followed him. As Johnson and Eley were talking, Hines came up to Johnson and said, "Bro, it's going down." *Id.* at 161-62. Johnson took out his gun and put it to Eley's head. She dropped to

¹ We direct Rhodes's counsel's attention to Indiana Appellate Rule 43, which requires that all copies of appellant's brief have blue front and back covers and be bound along the left margin.

² We remind Rhodes's counsel of his obligation pursuant to Indiana Appellate Rule 46(A)(6)(b) to state the facts in accordance with the standard of review appropriate to the judgment or order being appealed.

her knees and begged for her life. Johnson gave her a set of keys and told her to wait in the car. Hines rummaged through a closet with Fomby's .44 magnum. When Hines saw Eley with the keys, he snatched them away from her.

Meanwhile, in the living room, Rhodes stood up, pulled out his gun, and pointed it at Riley and Fuqua. Johnson returned to the living room, pointed his gun at Fuqua, and demanded his property. Rhodes told both men to give them everything they had in their pockets. Riley and Fuqua removed their money from their pockets and threw it on the floor. Rhodes told them to remove their clothes and shoes, which they did. Hines continued to rummage through the apartment with Fomby's gun. Johnson told Fuqua that he had never liked him. Rhodes yelled at Riley that he was going to "blow his n**r F-ing head off." *Id.* at 213. Hunter and Eley fled the apartment by different routes. Both heard gunshots as they fled. Hines ordered Rhodes to take the money, and they exited through the front door with Johnson.

Shortly after midnight, Hines arrived at the residence of Heaven Fowlkes, the mother of his child. Fowlkes saw that Hines had been running, was out of breath, had red eyes from crying, and had dirt and snow all over his clothes. Fowlkes asked him what was wrong, and he told her that Johnson had killed Riley and Fuqua. Rhodes arrived, and Hines let him in. Immediately thereafter, Johnson called to discuss what to do and how to meet up. Rhodes and Hines divided the money in Rhodes's pockets into two stashes. Rhodes took one stash, and Hines took the other. A car pulled up, and Hines and Rhodes left together.

When the Fort Wayne police arrived at Fomby's apartment, Riley was dead from multiple gunshot wounds. Fuqua had also been shot multiple times and died the next day.

The police recovered Rhodes's handgun not far from the crime scene, and it was determined to be one of the guns that had been used to shoot Fuqua and Riley. The police located Hines and Johnson the following day. Rhodes fled to Chicago and was found several months later.

On June 18, 2007, the State charged Rhodes with two counts of felony murder, two counts of class A felony robbery, and one count of class C felony carrying a handgun without a license. On February 6, 2008, a jury found Rhodes guilty of the felony murder and robbery counts. The trial court then found Rhodes guilty of carrying a handgun without a license.

On March 7, 2008, the trial court sentenced Rhodes to a sixty-five-year term for each murder conviction, to be served consecutively. The trial court entered judgment of conviction on the robbery convictions but for purposes of sentencing merged these convictions with the felony murder convictions. The trial court imposed an eight-year sentence for carrying a handgun without a license, served consecutively to the murder sentences.

On appeal, Rhodes challenges the sufficiency of the evidence supporting his felony murder convictions. Our standard of review is well settled.

In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and draw reasonable inferences therefrom. A conviction will be upheld if there is substantial evidence of probative value from which a jury could have found the defendant guilty beyond a reasonable doubt.

Overstreet v. State, 783 N.E.2d 1140, 1152 (Ind. 2003) (citations omitted).

To convict Rhodes of the felony murder charges, the State was required to prove beyond a reasonable doubt that he, while acting in concert with Hines and/or Johnson, killed

Fuqua and Riley, while knowingly or intentionally taking property from them or from their presence by using or threatening the use of force. Appellant's App. at 13-16; *see* Ind. Code § 35-42-1-1(2) ("A person who kills another human being while committing or attempting to commit ... robbery ... commits murder, a felony."); Ind. Code § 35-42-5-1 (defining robbery). To sustain a conviction for felony murder, the State must prove that the defendant intended to commit the underlying felony, but not that the defendant intended to kill. *Overstreet*, 783 N.E.2d at 1152.

Rhodes's insufficiency argument is premised on his contention that his felony murder convictions were based on accomplice liability theory,³ but we agree with the State that there was sufficient evidence from which the jury could reasonably conclude that Rhodes acted as a principal. The State presented evidence that Rhodes was the first person to pull out his gun and point it at Fuqua and Riley. There was testimony that Rhodes demanded that Fuqua and Riley give him their money, told them to remove their clothes, and told Riley that he was going to "blow his n**r f-ing head off." Tr. at 213. The evidence also shows that Rhodes carried the money away from the crime scene and later met with Hines to divide it. Finally, there was evidence from which the jury could reasonably infer that Hines and Rhodes drove away from Fowlkes's residence with Johnson. Rhodes's argument is merely an invitation to reweigh the evidence and judge witness credibility, which we must decline. Accordingly, we conclude that the evidence is sufficient to sustain Rhodes's felony murder convictions.

³ "An accomplice who acts in concert with another who actually committed the direct acts constituting the elements of the crime is equally as liable as a principal for all natural and probable consequences of plan." *Richardson v. State*, 697 N.E.2d 462, 465 (Ind. 1998). An accomplice is "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense[.]" Ind. Code § 35-41-2-4.

As a final matter, we observe that “the underlying felony is the lesser included offense of the felony murder.” *Griffin v. State*, 717 N.E.2d 73, 80 n.12 (Ind. 1999), *cert. denied* (2000). “Double jeopardy principles are violated when a defendant is convicted of both robbery and felony murder when the robbery is the underlying basis for the felony murder conviction.” *Sanchez v. State*, 794 N.E.2d 488, 491 (Ind. Ct. App. 2003), *trans. denied*. Because judgment of conviction was entered on both the robbery and the felony murder charges, the trial court improperly merged the robbery convictions with the felony murder convictions for sentencing purposes. Therefore, we remand with instructions to vacate Rhodes’s robbery convictions.

Affirmed and remanded.

KIRSCH, J., and VAIDIK, J., concur.