



## Case Summary and Issues

James Michael Reynolds appeals his convictions of robbery, a Class B felony, and assisting a criminal, a Class D felony. On appeal, Reynolds raises two issues: 1) whether Reynolds's conviction for assisting a criminal should be set aside for violating double jeopardy; and 2) whether the trial court committed fundamental error by not inquiring whether jurors had questions for the witnesses. Concluding that the convictions violate double jeopardy but that Reynolds has not demonstrated fundamental error with respect to the absence of juror questioning, we affirm in part and remand to the trial court to vacate Reynolds's conviction and sentence for assisting a criminal.<sup>1</sup>

## Facts and Procedural History

On November 2, 2004, Reynolds and Katherine Harris were driving around Bloomington, Indiana, looking for money to use to purchase cocaine. Harris suggested that they steal a purse. Reynolds pulled the car into a parking lot at a local medical complex and Reynolds and Harris observed people walking in and out of the building.

The couple spotted Carolyn Knudson, an elderly woman, walk out of the building. Reynolds suggested to Harris that they take Knudson's purse. As Knudson was getting into her car, Harris jerked the door open, leaned into the car, and demanded that Knudson give her the purse. Knudson initially did not let go of her purse and began screaming for help. Harris hit Knudson in the face, screaming "shut up, shut up." Transcript at 223. Knudson let go of her purse, and Harris ran off with the purse. Knudson watched as Harris ran across the

parking lot and jumped into Reynolds's car. Reynolds opened the door for Harris and drove quickly out of the parking lot once Harris was in his car.

Several witnesses assisted Knudson while she received medical attention. Meanwhile, Reynolds drove to a local gas station and used one of Knudson's credit cards to fill the gas tank. The couple tried to purchase approximately \$300.00 in groceries, but Knudson's credit card was declined. The couple also made a large purchase from McDonald's. Reynolds drove to Lake Monroe, where the couple placed rocks in Knudson's purse and threw it into the lake.

On November 5, 2004, Harris was driving Reynolds's car when police initiated a stop and inquired as to Reynolds's whereabouts. Harris directed the police to her son's home, where Reynolds was babysitting. Police arrived and arrested Reynolds. On November 8, 2004, the State charged Reynolds with Count I, Class B felony robbery; Count II, Class D felony assisting a criminal; and Count III, Class A misdemeanor resisting law enforcement. The State also alleged that Reynolds was an habitual offender.

On October 11, 2005, Reynolds's jury trial began. The court read to the jury the following instruction:

You are allowed to submit questions to witnesses to clarify their testimony during trial under certain conditions. If you feel the answer to your question would be helpful in understanding this case, please raise your hand after the lawyers have completed their examinations, but before the witness is excused.

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<sup>1</sup> We note that in issuing a new sentencing order pursuant to this court's instructions, it will not be necessary for the trial court to hold a new sentencing hearing.

Tr. at 192. The trial court did not ask the jurors if they had any questions at the conclusion of each witness's testimony. When the judge dismissed the jury at the close of the first day of trial, the judge asked the parties if there was any outstanding business, and noted that Reynolds had not lodged any objections to that point. The judge admitted, "I keep forgetting to pan the jury at the conclusion of every witness." Id. at 276. The judge then asked both Reynolds and the State if they had seen "any hands waving" or jurors otherwise indicating that they wanted to ask a question. Id. The State answered "no." Id. Reynolds failed to give an audible response to the question.

After the final witness was excused, one juror submitted a question to the court. The witness was placed back on the stand to answer the question, and no other questions were submitted to the court. The parties then proceeded with final arguments.

The jury found Reynolds guilty of Counts I and II but could not reach a verdict on Count III. The State dismissed Count III. The jury then found that Reynolds was an habitual offender. The trial court entered judgments of conviction on Counts I and II, and also entered judgment on Reynolds's habitual status.

Reynolds's sentencing hearing was held on November 10, 2005. Reynolds argued at the sentencing hearing that Counts I and II were factually the same and that the counts should merge. The trial court found the offenses to be factually the same and "merged for the purposes of sentencing." Tr. at 620. The trial court sentenced Reynolds to sixteen years on Count I, which it enhanced by sixteen years due to Reynolds's habitual offender status. The

trial court sentenced Reynolds to three years on Count II, to be served concurrently with Count I. Reynolds now appeals.

### Discussion and Decision

#### I. Double Jeopardy

On November 8, 2004, the State charged Reynolds with two different counts:

[Count I:] On November 2, 2004 in Monroe County, Indiana, the defendant knowingly aided Katherine Lorraine Harris in the commission of a Robbery Resulting In Injury . . . by driving the get-a-way car after Harris took a purse from Carolyn Knudson by using force, resulting in bodily injury.

[Count II:] On November 2, 2004 in Monroe County, Indiana, the defendant assisted Katherine Lorraine Harris, who had committed the crime of Robbery With Injury, a class B felony, with intent to hinder her apprehension.

Appellant's Appendix at 14.

The trial court entered judgments of conviction against Reynolds on both Counts I and II and sentenced him to concurrent terms of sixteen years on Count I and three years on Count II. The State concedes that Reynolds's convictions on both counts violate double jeopardy. "[T]wo or more offenses are the 'same offense' in violation of Article 1, Section 14 of the Indiana Constitution if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999) (emphasis omitted).

If there is "a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense," then double jeopardy is violated. Id. at

53. In determining what evidence the trier of fact used to establish the essential elements of an offense, “we consider the evidence, charging information, final jury instructions . . . and arguments of counsel.” Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

In this case, the evidence used to support Counts I and II is the same. The State concedes that it presented no different or additional evidence to support the conviction for assisting a criminal than it did to support the conviction for robbery. In addition, our courts have held that the crime of assisting a criminal is “intended to apply to a person who did not actively participate in the crime itself, but rather assisted a criminal after the fact.” Wright v. State, 690 N.E.2d 1098, 1108 (Ind. 1997). As Reynolds actively participated in the crime, and his actions thereafter were in continuation of his and Harris’s scheme to commit robbery, Reynolds cannot be convicted of both robbery and assisting a criminal. See Kelly v. State, 813 N.E.2d 1179, 1185 (Ind. Ct. App. 2004) (holding that where defendant actively participated in assaulting, robbing, and murdering victim, subsequent acts to cover up the crimes were continuation of common scheme and not a separate offense; defendant could therefore not be convicted of both felony murder and assisting a criminal), trans. denied. Therefore, the trial court erred when it entered judgments of conviction and sentences on both counts subsequent to the jury’s guilty verdicts. We remand to the trial court with instructions that Reynolds’s conviction and sentence for Count II be vacated. See Green v. State, 856 N.E.2d 703, 704 (Ind. 2006) (stating that entry of judgment of conviction and sentence on only one count is the appropriate remedy for a double jeopardy violation).

## II. Juror Questions

Reynolds argues that he was denied his right to a trial by jury as guaranteed by the Sixth Amendment of the United States Constitution and Article 1, Section 13 of the Indiana Constitution because the trial judge failed to survey the jury after each witness to see if the jurors had any questions. We disagree.

Indiana Evidence Rule 614(d) says: “[A] juror may be permitted to propound questions to a witness by submitting them in writing to the judge, who will decide whether to submit the questions to the witness for answer, subject to the objections of the parties . . . .” Indiana Jury Rule 20(a)(7) provides that the court “shall instruct the jury before opening statements . . . [t]hat jurors may seek to ask questions of the witnesses by submission of questions in writing.”

In this case, the trial judge instructed the jurors that they could ask questions and the procedure for doing so, but it did not survey the jurors after each witness to see if they had any questions. At the end of the first day of trial, the trial court noted that it failed to do so. The trial court asked the parties if they saw any of the jurors “waving their hands” or otherwise indicating that they had questions. Tr. at 276. Reynolds did not respond verbally to the trial court’s inquiry. Furthermore, Reynolds did not move for a curative measure or a mistrial because of the judge’s failure to survey the jury. Throughout the remainder of the trial, Reynolds did not raise any objection or otherwise remind the court that it was not asking jurors if they had questions. Nor did he request a recess or side bar so that he could advise the judge of the problem or request that the trial court declare a mistrial.

Therefore, Reynolds has waived this issue on appeal because he failed to object at trial. See Benson v. State, 762 N.E.2d 748, 755 (Ind. 2000) (stating that it is only on rare occasions that a reviewing court will address claims challenging a judge’s comments absent a contemporaneous objection during trial). The exception to the waiver rule applies only if the claimed error “satisfies [the court’s] extremely narrow fundamental error exception.” Id.

To qualify as a fundamental error, “an error must be so prejudicial . . . as to make a fair trial impossible.” Id. (quoting Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999)). Appellate courts apply the fundamental error exception “only when the error constitutes a blatant violation of basic principles [of due process], the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” Baer v. State, 866 N.E.2d 752, 764 (Ind. 2007) (quoting Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006)).

Reynolds does not actually argue that the trial court committed a fundamental error in this case. Rather, he claims that he was denied a trial by jury, a fundamental right protected by the Sixth Amendment to United States Constitution and Article I, Section 13 of the Indiana Constitution. Reynolds argues that “[w]hen a court denies the jurors the right to ask questions of every witness, it denies the defendant his right to a jury trial as proscribed [sic] by Indiana law.” Brief of Appellant at 9. Simply claiming a violation of a constitutional right is not sufficient to invoke the doctrine of fundamental error, however. Absher v. State, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007).



In Howard v. State, 818 N.E.2d 469 (Ind. Ct. App. 2004), trans. denied, a panel of this court faced a similar situation. In Howard, the trial court gave the following preliminary instruction on how to submit questions to the witnesses:

“The Indiana Rules of Evidence allow the court to permit jurors to submit questions to be asked of witnesses to clarify the [witness’] testimony. You may do so in this case by putting your questions in writing and submitting them to me after the lawyers have completed their examination of the witness.”

Id. at 473. The trial court did not ask the jurors if they had any questions before witnesses left the stand. On the second day of the trial, Howard moved for a mistrial because the trial court did not ask the jurors if they had questions before dismissing the witnesses. The trial court denied the motion.

The Howard court stated that the trial court is “merely required not to leave the jurors in doubt as to how to submit a question.” Id. at 480. Indiana Rule of Evidence 614(d) and Indiana Jury Rule 20 provide that jurors have a right to ask questions, and require that they be informed of that right. Id. at 478. However, the court also said, “[T]he requirement of asking jurors if they have any questions before excusing each witness cannot be found in Jury Rule 20(a)(7) or Evidence Rule 614(d) . . . . [R]equiring the trial court to ask the jurors if they have any questions before excusing each witness would render Jury Rule 20(a)(7)’s requisite preliminary instruction superfluous.” Id. at 479-80.

The trial court’s failure to survey the jury in this case was not error because the trial court gave the appropriate instructions to the jurors informing them of how they were to submit questions for witnesses. The record reflects that one juror asked the final witness a

question. It is obvious from this that the jury was instructed how to submit a question for a witness.

Furthermore, the record demonstrates that neither the trial court, the attorneys, nor the parties themselves noticed that any other juror had a question during the presentation of testimony. Tr. at 276. Reynolds has not shown that any juror had a question that he was not allowed to present to the court. Therefore, we conclude that the trial court did not commit a fundamental error in failing to survey the jury after each witness's testimony and Reynolds was not denied his right to a jury trial.

#### Conclusion

We conclude that Reynolds's convictions of assisting a criminal violates double jeopardy, but the trial court did not commit fundamental error in failing to survey the jury to see if there were outstanding questions for the witnesses. Therefore, we reverse Reynolds's conviction and sentence for assisting a criminal and remand to the trial court with instructions to vacate the conviction and sentence. In all other respects, the judgment of the trial court is affirmed.

Affirmed in part; reversed and remanded in part.

KIRSCH, J., and BARNES, J., concur.