MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Jason Epeards,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

September 7, 2022

Court of Appeals Case No. 22A-CR-65

Appeal from the Marion Superior Court

The Honorable Mark D. Stoner, Judge

Trial Court Cause No. 49D32-1808-MR-28400

Bailey, Judge.

Case Summary

[1] Jason Epeards ("Epeards") appeals his conviction and sentence for Felony Murder.[1]

[2] We affirm.

Issues

[3] Epeards raises three issues on appeal which we restate as follows:

I. Whether Epeards invited any error as to his claim that the trial court abused its discretion when it instructed the jury.

II. Whether Epeards's claim regarding his motion for a directed verdict on Count I, Murder, is moot.

III. Whether Epeards's sentence is inappropriate in light of the nature of the offense and his character.

Facts and Procedural History

[4] On August 20, 2018, Epeards was driving his mother's blue Chevrolet Impala, which was equipped with a LifeSaver ignition interlock breathalyzer device that took a picture of the car's interior when a person blew into it. Epeards's passengers were Jesean Dale ("Dale") and Juwaun Terry ("Terry"). According

[1] Ind. Code § 35-42-1-1(2).

to log reports taken from the LifeSaver device, at 6:58 p.m. that day all three men were in the vehicle, and the butt of a rifle was visible next to Dale.

[5] Epeards drove to a vacant house on Kristen Circle in Indianapolis, and the three men kicked in the back door of the house and entered. Dale carried a rifle into the house in a duffle bag, and Epeards handed a handgun to Terry. Either Dale or Terry ordered a pizza delivery from Papa John's, and they both stated to Epeards that they intended to rob the pizza delivery person. Dale and Terry placed shirts over their faces as masks.

[6] The Papa John's delivery person that day was Lavon Drake ("Drake"), who was a manager-in-training. Drake was not scheduled to work that day but had agreed to do so because Papa John's was short-staffed. Drake drove to the house on Kristen Circle and went to the front door. Epeards opened the front door, and Terry pointed the rifle at Drake and forced him into the house and onto the floor. Epeards took the pizza bag from Drake and walked out to the Chevy Impala with it. Epeards heard "three or four" gunshots. Ex. v. II at 48. Drake was shot six times in the back, neck, and head, and he died at the scene. Ballistics evidence recovered from the scene showed that Drake was shot and killed by the type of firearms possessed by Dale and Terry at the abandoned house.

[7] At 7:08 p.m., Epeards, Terry, and Dale were back in the vehicle together, and a red item was visible next to passenger Dale. Epeards drove the three men to Terry's apartment where they all ate some of the stolen pizza together.

[8] Clinton Adkins ("Adkins"), the general manager at the Papa John's where Drake worked, became concerned when the store's online tracking system showed Drake's vehicle was still at the delivery site and Drake did not answer his phone when Adkins tried to call him. Adkins drove to the Kristen Circle address, where he found Drake's truck parked in the driveway but no sign of Drake. Adkins noticed the house appeared to be vacant, and he saw a realtor lock box on the front door. Concerned by this discovery, Adkins called 9-1-1 at 7:39 p.m. When the first responding officer looked through a window of the house, he saw Drake lying on the floor with an apparent head injury. The back door to the unoccupied house was damaged and had been forced open.

[9] A neighbor reported to police that an unfamiliar blue Chevy Impala had been seen in the neighborhood and provided the car's license plate number. A detective drove around the area looking for the car and found it parked at a nearby apartment complex. Shortly after 10:00 p.m., Epeards got into the car and began to drive away. Police conducted a "felony stop"[2] and took Epeards into custody. On the back seat floorboard, police found a Bersa 9 mm handgun with a live round in the chamber and rounds in the magazine. Ballistics testing confirmed that the spent 9 mm casings found at the scene and several bullet fragments recovered from Drake's body during the autopsy were fired by that

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[2] Officer Donal Meier of the Indianapolis Metropolitan Police Department testified that a "felony stop" is a "high risk stop" of someone the police know will be charged with a felony and who is very likely to "fight or flee." Tr. v. II at 241. Therefore, in a felony stop the police have a "minimum of two cars" positioned on each side of the stopped vehicle, and they "call the person out of the vehicle." *Id.*

handgun. Epeards's fingerprint was also found on the magazine inside the handgun.

[10] Epeards waived his *Miranda* rights and gave police a statement that night. Epeards admitted he was present at the crime scene and took the pizza, but he denied being armed and being present when Dale and Terry shot and killed Drake. Epeards stated that Dale and Terry told him they were "just gonna [sic] rob" the pizza delivery person. Ex. v. 2 at 45. Epeards admitted that he took Dale and Terry back to Terry's apartment when they left the abandoned house and that they all went inside Terry's apartment and ate some of the pizza.

[11] Police went to Terry's apartment and arrested Terry and Dale. Police found a Papa John's pizza box inside the oven in the kitchen, and another Papa John's box inside the refrigerator. In a trash receptacle outside the apartment, police found a Papa John's red pizza-warming bag inside a garbage bag. Inside another garbage bag, police found several more Papa John's pizza boxes. All of the pizza boxes recovered from the apartment and the trash outside were labeled for delivery to the Kristen Circle address.

[12] The State charged Epeards with Count I, murder;[3] Count II, felony murder; and Count III, robbery resulting in serious bodily injury, as a Level 2 felony.[4] Prior to trial, Epeards tendered a "mere presence" accomplice liability jury

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[3] I.C. § 35-42-1-1(1).

[4] I.C. § 35-42-5-1(a)(1).

instruction.[5] App. v. II at 108-09. After reviewing the trial court's accomplice liability jury instruction and being informed by the court that the court's instruction contained all of the information the defense had submitted, Epeards said, "The defense is fine with this." Tr. v. III at 135. When the jury instructions were finalized, Epeards advised the court that his tendered instruction was "covered by" the trial court's instruction, and Epeards did not raise any objection to the court's accomplice liability instruction. *Id.* at 173-74, 187-88. At the close of the State's case-in-chief, Epeards moved for a directed verdict on Count I, the murder charge, which the trial court denied. At the close of the trial, the jury found Epeards not guilty on Count I, the murder charge, but guilty on the charges of felony murder and robbery, as a Level 2 felony.

[13] The trial court entered judgment of conviction for Count II, felony murder, but did not enter a conviction on Count III, robbery, "due to double jeopardy" concerns. Appealed Order at 1. The trial court found as mitigating factors the facts that Epeards had no prior criminal history and that he was not one of the two shooters. The trial court found the nature and circumstances of the crime to be an aggravating factor. The trial court imposed a fifty-five-year sentence

[5] Epeards's tendered instruction stated: "Mere presence at the scene of a crime does not establish a person as an accessory; nor is acquiescence in the commission of a crime by another sufficient to render a person guilty as an accomplice." App v. II at 109.

with ten years suspended and a two-year probationary term. This appeal ensued.

Discussion and Decision

Jury Instructions/Invited Error

[14] Epeards challenges the trial court's failure to give his proposed jury instruction regarding accomplice liability to the jury. We review a trial court's decision to tender or refuse to tender a jury instruction for an abuse of discretion. *Pattison v. State*, 54 N.E.3d 361, 365 (Ind. 2016). However, we do not address the merits of Epeards's jury instruction claim because he invited any alleged error by affirmatively approving of the accomplice liability instruction that was given.

[15] Generally, a party's failure to object to, and thus preserve, an alleged trial error results in waiver of that claim on appeal. *Batchelor v. State*, 119 N.E.3d 550, 558 (Ind. 2019). However, when a failure to object is accompanied by the party's affirmative requests of the court, "it becomes a question of invited error." *Brewington v. State*, 7 N.E.3d 946, 974 (Ind. 2014).

> This doctrine—based on the legal principle of estoppel—forbids a party from taking "advantage of an error that she commits, invites, or which is the natural consequence of her own neglect or misconduct." *Wright v. State*, 828 N.E.2d 904, 907 (Ind. 2005).

Durden v. State, 99 N.E.3d 645, 651 (Ind. 2018).

[16] To establish invited error,

> there must be some evidence that the error resulted from the appellant's affirmative actions as part of a deliberate, well-informed trial strategy. A passive lack of objection, standing alone, is simply not enough. And when there is no evidence of counsel's strategic maneuvering, we are reluctant to find invited error based on the appellant's neglect or mere acquiescence to an error introduced by the court or opposing counsel.

Batchelor, 119 N.E.3d at 558 (quotation and citations omitted). An invited error is not subject to fundamental error review. *Id.* at 556.

[17] Here, Epeards not only failed to object to the jury instruction on accomplice liability that the court used, but he affirmatively stated, "The defense is fine with this." Tr. v. III at 135. Later in the trial, during the review of the final jury instructions, Epeards again referenced the trial court's "long accomplice liability instruction" and stated, "We tendered one that we believe is covered by this…," and Epeards did not object to the court's instruction. *Id.* at 174. A few moments later, after noting that he had no proposed instructions to submit to the trial court, Epeards once again referenced the "prior instruction" he had "submitted … which is covered by the Court's 'mere presence' instruction." *Id.* at 187-88. Because Epeards affirmatively approved of the trial court's jury instruction regarding accomplice liability as incorporating his own tendered instruction, he invited any alleged error and may not now attack the instruction. *See Batchelor,* 119 N.E.3d at 558.

[18] Epeards also contends that the trial court "watered down the mens rea for felony murder" by defining the words "to wit" while reading the accomplice

liability instruction to the jury. Reply Br. at 4.[6] However, Epeards failed to object to the court's extemporaneous definition at trial; therefore, he has waived the issue on review. *See, e.g.*, *Batchelor*, 119 N.E.3d at 558. Moreover, we note that the court's definition was correct; Black's Law Dictionary defines "to wit" as "That is to say; namely." *To Wit*, Black's Law Dictionary (10th ed. 2014). And, finally, Epeards has cited no applicable legal authority or presented cogent argument regarding how the court accurately defining the term "to wit" harmed him in any way, much less how it "watered down the mens rea" for his crime. Reply Br. at 4.

Directed Verdict Ruling/Mootness

[19] Epeards challenges the trial court's denial of his motion for a directed verdict on Count I, murder. However, the jury found Epeards not guilty of murder. "The long-standing rule in Indiana courts has been that a case is deemed moot when no effective relief can be rendered to the parties before the court." *Mosley v. State*, 908 N.E.2d 599, 603 (Ind. 2009); *see also Jones v. State*, 847 N.E.2d 190, 200 (Ind. Ct. App. 2006) ("[W]hen we are unable to provide effective relief upon an issue, the issue is deemed moot, and we will not reverse the trial court's determination where absolutely no change in the status quo will result."(quotation and citation omitted)), *trans. denied*. Because Epeards has already received the same relief he would have received from the grant of a

[6] When coming upon the words "to-wit" while reading the instruction, the trial court judge stated: "and 'to wit' is a legal acronysm (sic). It stands for 'namely,' okay?" Supp Tr. at 7.

directed verdict—i.e., entry of a "not guilty" verdict on the murder charge—this issue is moot.

Appellate Rule 7(B)

[20] Epeards contends that his fifty-five-year sentence, with ten years suspended, for his felony murder conviction is inappropriate in light of the nature of the offense and his character. Article 7, Sections 4 and 6, of the Indiana Constitution "authorize[] independent appellate review and revision of a sentence imposed by the trial court." *Roush v. State*, 875 N.E.2d 801, 812 (Ind. Ct. App. 2007) (alteration in original). This appellate authority is implemented through Indiana Appellate Rule 7(B). *Id.* Revision of a sentence under Rule 7(B) requires the appellant to demonstrate that his sentence is "inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); *see also Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

[21] Indiana's flexible sentencing scheme allows trial courts to tailor an appropriate sentence to the circumstances presented, and the trial court's judgment "should receive considerable deference." *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008). The principal role of appellate review is to attempt to "leaven the outliers." *Id.* at 1225. Whether we regard a sentence as inappropriate 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. The question is not whether another

sentence is more appropriate, but rather whether the sentence imposed is inappropriate. *King v. State*, 894 N.E.2d 265, 268 (Ind. Ct. App. 2008). Deference to the trial court "prevail[s] unless overcome by compelling evidence portraying in a positive light the nature of the offense (such as accompanied by restraint, regard, and lack of brutality) and the defendant's character (such as substantial virtuous traits or persistent examples of good character)." *Stephenson v. State*, 29 N.E.3d 111, 122 (Ind. 2015).

[22] Epeards contends that the nature of the offense does not support his fifty-five-year sentence for felony murder. First, we note that the trial court imposed the advisory sentence for felony murder (i.e., fifty-five years), suspended all the time above the minimum sentence (i.e., forty-five years), and only placed Epeards on probation for two years rather than for the entire term of the suspended sentence. *See* I.C. § 35-50-2-3. The advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed," *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006); thus, "[w]e are unlikely to consider an advisory sentence inappropriate." *Shelby v. State*, 986 N.E.2d 345, 371 (Ind. Ct. App. 2013), *trans. denied*. "[A] defendant sentenced to the advisory term bears a particularly heavy burden in persuading [the] court on appeal that his sentence is inappropriate." *Id.*

[23] Second, our review of the record discloses nothing remarkable about the nature of the offense that would warrant revising Epeards's sentence. "The nature of the offense is found in the details and circumstances of the commission of the offense and the defendant's participation." *Zavala v. State*, 138 N.E.3d 291, 301

(Ind. Ct. App. 2019) (quotation and citation omitted), *trans. denied*. One factor we consider is "whether there is anything more or less egregious about the offense committed by the defendant that makes it different from the typical offense accounted for by the legislature when it set the advisory sentence." *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017) (citation omitted), *trans. denied*. Here, Epeards participated in a senseless and heinous murder by driving the murderers to the scene of the crime, handing a gun to one of the murderers, walking away from the scene as he heard shooting, and driving the shooters home where they all callously ate the pizza they had stolen from the murdered pizza delivery person. And, although Epeards was not one of the shooters, the trial court already took that mitigating factor into consideration when it imposed the advisory sentence upon Epeards and then suspended ten years of it. We find nothing else in the nature of the offense that would warrant revising Epeards's sentence even lower.

[24] Nor does Epeards's character support a sentence revision. Analysis of an offender's character "involves a broad consideration of [his] qualities, life, and conduct." *Crabtree v. State*, 152 N.E.3d 687, 705 (Ind. Ct. App. 2020), *trans. denied*. We also consider "facts such as substantial virtuous traits or persistent examples of good character." *Prince v. State*, 148 N.E.3d 1171, 1174 (Ind. Ct. App. 2020) (quotation and citation omitted). Regarding his character, Epeards notes that he has no criminal history and that he cooperated with police and confessed to his own actions. However, we note that Epeards initially denied his involvement in the crime and only cooperated when he was confronted with

photographs of himself in the car with the two shooters both before and after the murder. Moreover, as the trial court noted, immediately following the murder, Epeards and the two shooters went home to "eat[] the pizza with the callousness of folks [who] had no regard for life at that particular stage and no particular conscience." Tr. v. III at 240. We find nothing in the nature of Epeards's character that merits a reduction in his sentence.

[25] Epeards has failed to carry his burden of persuading us that the nature of his offense and his character support a revision of his sentence.

Conclusion

[26] Epeards invited any alleged error in instructing the jury about accomplice liability; therefore, he may not challenge that alleged error on appeal. Epeards's contention regarding alleged error in denying his motion for directed verdict on the murder charge is moot, as the jury found Epeards not guilty of murder. And Epeards has not persuaded us that the nature of his offense and his character warrant a reduction in his sentence, which is the advisory sentence with ten years suspended.

[27] Affirmed.

Bradford, C.J., and Altice, J., concur.