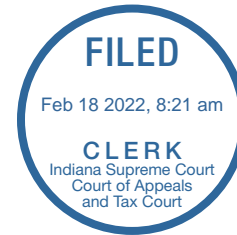


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Makyi Toliver,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

February 18, 2022

Court of Appeals Case No.  
21A-CR-1882

Appeal from the St. Joseph  
Superior Court

The Honorable John M.  
Marnocha, Judge

Trial Court Cause No.  
71D02-2005-MR-9

**Brown, Judge.**

[1] Makyi Toliver appeals his conviction for felony murder. We affirm.

### ***Facts and Procedural History***

[2] Toliver and Chiqueal Baker were friends. At some point, Baker found a gun under a trailer and began carrying it with him. On September 4, 2019, Toliver sent a message to Curtis Frazier, Jr., stating that Baker had a gun. Toliver and Frazier exchanged a number of messages regarding their plan to take the gun from Baker.

[3] In the afternoon of September 6, 2019, Baker and Toliver were at the home of Baker's grandmother when Baker agreed to go with Toliver to his sister's home. Toliver's sister picked up Toliver and Baker and drove to the home of Toliver's mother. At some point, Frazier joined Toliver and Baker. Toliver, Frazier, and Baker walked to a gas station and to a park where they began smoking. Toliver asked for Baker's phone, and Baker gave it to him. Baker stated he was leaving and "went to shake up with [Frazier]," Frazier "tried to pull [him] in," Baker "pushed off of" Frazier, and Toliver "hit [Baker] twice from the backside to [his] face" and "threw a third punch, but [Baker] ducked and . . . started running." Transcript Volume II at 133.

[4] Baker ran toward a house, and Toliver and Frazier chased him. As he ran, Baker heard Toliver say he "was gonna kill" him. *Id.* Baker reached the house

and yelled “Help me. Help me.” *Id.* Baker saw that Toliver had a knife.<sup>1</sup> Baker ran around a car and was between the car and a garage. Toliver moved around one side of the car and toward Baker, Baker said “[s]top. Stop,” Toliver “kept coming” and “went in striking mode with the knife,” Baker said “[g]et back. Get back” and shot,<sup>2</sup> and Toliver “started fading back, like, getting away from [him].” *Id.* at 134. Frazier “came out of nowhere” and struck Baker “real hard,” and Baker “fired a shot.” *Id.* at 135. According to Baker, “Frazier kept coming. I fired. I tried to run past him as [] Frazier is falling back from the gunshot. I tried to run past him. [] Frazier grabbed my ankle; and I tripped.” *Id.* Toliver “came under the car, grabbed [Baker], [and] tried to pull [him] under the car,” and Baker said “[l]et me go” and “let a shot off.” *Id.* Toliver was trying not to let go of Baker, and Baker “just shot the gun until [Toliver] released [him]” and then ran away. *Id.* Frazier died as a result of gunshot wounds to his chest and neck. Toliver later sent a message stating “Man brotha ts ain’t no joke . . . I had to watch c murda die onna concrete . . . our boa didn’t deserve nun of dat . . . I low key was the one who shoulda died God just works so weird brotha.” State’s Exhibit 158.

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<sup>1</sup> When asked “[d]id you see the knife,” Baker said “[y]es, I did,” and when asked “[d]id you see the knife while you were running or at another time,” he answered “I saw the knife. I thought I saw it while I looked back, but I got to see it visually when we got to where the light was at from the house. That’s when I could visually see that he had a knife.” Transcript Volume II at 133.

<sup>2</sup> Baker testified Toliver “went like this (gesturing); so I shot.” Transcript Volume II at 134.

[5] On May 28, 2020, the State charged Toliver with: Count I, murder; and Count II, attempted robbery as a level 5 felony. In July 2021, the court held a jury trial. Officer Kyle Slater, a crime scene investigator, testified that he did not find a knife at the scene. When asked “how confident are you that there was a knife in either of those patches of woods that you would’ve been able to find it,” Officer Slater indicated: “It would’ve been a needle in a haystack.” Transcript Volume II at 217. The jury found Toliver guilty on both counts as charged. The court sentenced Toliver to concurrent terms of forty-five years for his conviction for murder and three years for his conviction for attempted robbery.

### *Discussion*

[6] When reviewing the sufficiency of the evidence needed to support a criminal conviction, we neither reweigh evidence nor judge witness credibility. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). We consider only the evidence supporting the judgment and any reasonable inferences that can be drawn from such evidence. *Id.* We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have concluded the defendant was guilty beyond a reasonable doubt. *Id.* The uncorroborated testimony of one witness is sufficient to sustain a conviction. *Ferrell v. State*, 565 N.E.2d 1070, 1072-1073 (Ind. 1991).

[7] Toliver argues the evidence is insufficient to sustain his conviction for murder. He argues neither he nor Frazier were armed, “[n]o knife was recovered,” and “[i]t was not reasonably foreseeable that Baker would empty a handgun into his two assailants.” Appellant’s Brief at 10. He also urges this Court to revisit the

application of the felony murder statute and adopt the reasoning of the dissenting opinion in *Palmer v. State*, 704 N.E.2d 124 (Ind. 1999).

[8] Ind. Code § 35-42-1-1 provides in part: “A person who . . . kills another human being while committing or attempting to commit . . . robbery . . . commits murder, a felony.” The State need not prove the intent to kill, but only the intent to commit the underlying felony. *Luna v. State*, 758 N.E.2d 515, 517 (Ind. 2001). A person is subject to conviction for felony murder based on accomplice liability for the underlying offense. *Id.* “[T]he felony murder rule applies ‘when, in committing any of the designated felonies, the felon contributes to the death of *any* person.’” *Forney v. State*, 742 N.E.2d 934, 938 (Ind. 2001) (citing *Palmer*, 704 N.E.2d at 126; *Jenkins v. State*, 726 N.E.2d 268, 269 (Ind. 2000) (rejecting defendant’s contention that felony murder statute does not impose criminal liability for murder when resulting death is that of co-perpetrator)). “Therefore, it matters not whether the death caused is that of the intended victim, a passerby or even a co-perpetrator.” *Id.* at 938-939.

[9] In *Palmer*, a parolee was summoned to report to his parole officer and asked the defendant to accompany him. *Layman v. State*, 42 N.E.3d 972, 976 (Ind. 2015) (citing *Palmer*, 704 N.E.2d at 125). At the parole office, correctional officers attempted to arrest the parolee, the defendant produced a gun and held it to the head of one of the officers, and the parolee was released. *Id.* at 976-977 (citing *Palmer*, 704 N.E.2d at 125). The parolee told the defendant to shoot the officer, the officer heard the defendant’s gun cock and grabbed the gun’s barrel, and a struggle ensued. *Id.* at 977. The defendant fired his weapon striking the officer

in the hand, and a fellow officer then fatally shot the parolee. *Id.* The defendant was convicted of felony murder in the perpetration of a kidnapping.

[10] On appeal, the Indiana Supreme Court held that “the statutory language ‘kills another human being while committing’ does not restrict the felony murder statute solely to instances in which the felon is the killer.” *Id.* (citing *Palmer*, 704 N.E.2d at 126). “Rather, the felony murder statute may also apply equally when, in committing any of the designated felonies, the felon, although not the killer, reasonably should have foreseen that his felonious conduct would result in the ‘mediate or immediate cause’ of the victim’s death.” *Id.* A dissenting opinion in *Palmer* stated the defendant “did not kill another human being; his co-perpetrator was killed by a law enforcement official” and “[u]nder the terms of the felony murder statute, [the defendant] is not guilty of felony murder.” *Palmer*, 704 N.E.2d at 128 (Sullivan, J., concurring in part and dissenting in part; joined by Shepard, C.J.).

[11] In *Layman v. State*, the appellants requested the Indiana Supreme Court to revisit and overrule *Palmer* and instead adopt the view expressed in the dissent that the felony murder statute does not authorize the imposition of liability for murder where the defendant’s fellow perpetrator was the person killed. 42 N.E.3d at 977. The Indiana Supreme Court held “[w]e decline the invitation to overrule *Palmer*.” *Id.* The Court noted, “[f]irst, it has been the law in this jurisdiction now for over a decade and a half” and “we have since affirmed its validity on two occasions.” *Id.* (citing *Forney*, 742 N.E.2d at 938; *Jenkins*, 726 N.E.2d at 269-270). The Court further noted that, “in the years since *Palmer*

was decided the Indiana Legislature has amended the felony murder statute on at least four occasions, but has not done so in a way that undermines [the Indiana Supreme Court’s] consistent interpretation of the statute.” *Id.* at 977-978 (footnote omitted). The Court also stated, “[a]side from the fact that in each case a co-perpetrator was fatally injured by someone other than the defendant, the common thread uniting *Palmer*, *Jenkins*, and *Forney* was that an armed defendant engaged in violent and threatening conduct, either as a principle or an accessory, that resulted in the ‘mediate or immediate cause’ of a co-perpetrator’s death.” *Id.* at 979.

[12] With respect to Toliver’s request that this Court adopt the reasoning in the dissenting opinion in *Palmer*, we observe “[i]t is not this [C]ourt’s role to reconsider or declare invalid decisions of” the Indiana Supreme Court, *Horn v. Hendrickson*, 824 N.E.2d 690, 694 (Ind. Ct. App. 2005), and we adhere to the Indiana Supreme Court’s opinion in *Layman* which reaffirmed *Palmer* and held that the felony murder statute may “apply equally when . . . the felon, although not the killer, reasonably should have foreseen that his felonious conduct would result in the ‘mediate or immediate cause’ of the victim’s death.” *See Layman*, 42 N.E.3d at 977 (citing *Palmer*, 704 N.E.2d at 126). *See also Sharp v. State*, 42 N.E.3d 512, 516 (Ind. 2015) (observing *Layman* “affirmed the continued validity of *Palmer* and its progeny”).

[13] The record reveals that Toliver and Frazier intended to rob Baker of a gun. In particular, the State presented evidence that Toliver and Frazier agreed to physically attack Baker and take the gun from him. Baker testified that Toliver

and Frazier chased him from the park to a house and that he saw that Toliver had a knife. When Baker was between the car and garage, Toliver moved around the car, ignored Baker's requests to stop, and "went in striking mode with the knife" until Baker fired his weapon. Transcript Volume II at 134. Frazier "came out of nowhere" and struck Baker, Baker fired a shot and attempted to run past him, and Frazier grabbed his ankle. *Id.* at 135. Toliver then attempted "to pull [Baker] under the car" and would not let go of him, and Baker "shot the gun" until Toliver released him. *Id.* While Toliver argues he was unarmed, the State elicited testimony from Baker that Toliver had a knife. The evidence also shows that Toliver knew that Baker had the gun and that it had a "full clip." State's Exhibit 150. The State presented evidence from which a jury could conclude that Toliver, although not the person who shot Frazier, "engaged in violent and threatening conduct" in committing the attempted robbery and "reasonably should have foreseen that his felonious conduct would result in the 'mediate or immediate cause' of the victim's death." *See Layman*, 42 N.E.3d at 977-979; *Palmer*, 704 N.E.2d at 126.

[14] Based upon the record, we conclude the State presented substantial evidence of probative value from which a reasonable trier of fact could have concluded beyond a reasonable doubt that Toliver was guilty of murder.

[15] For the foregoing reasons, we affirm Toliver's felony murder conviction.

[16] Affirmed.

May, J., and Pyle, J., concur.