MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Floyd Smith,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

April 7, 2022

Court of Appeals Case No. 21A-CR-905

Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No. 79D01-2003-MR-3

Robb, Judge.

Case Summary and Issues

[1] Following a jury trial, Floyd Smith was convicted of murder. The trial court sentenced Smith to sixty years to be served in the Indiana Department of Correction ("DOC").

[2] Smith now appeals his conviction and sentence, raising multiple issues for our review which we restate as: (1) whether the trial court abused its discretion by failing to give a lesser-included offense instruction; (2) whether the information charging Smith with murder constituted fundamental error; and (3) whether Smith's sentence is inappropriate in light of the nature of his offense and his character. Concluding the trial court did not abuse its discretion by refusing to instruct the jury of a lesser-included offense, the charging information did not constitute fundamental error, and Smith's sentence was not inappropriate, we affirm.

Facts and Procedural History

[3] On March 7, 2020, Smith, Joseph Wilkerson, and Nathan Reene met at a sports bar in Lafayette, Indiana, to have a drink. While they were drinking, Smith suggested to Wilkerson that they should kill a mutual friend named Donnie Alkire and Wilkerson agreed. Smith offered to drive Reene home but stated they needed to stop at Alkire's apartment first. When the three men arrived at Alkire's residence, Reene was told to wait on the porch. While still in the

vehicle, Smith gave Wilkerson a knife and "threatened [his] family" if Wilkerson did not go along with the plan to kill Alkire. Transcript, Volume II at 175. Smith told Wilkerson that he would give him a signal when to kill Alkire. *See id.* at 177. Smith and Wilkerson then went to Alkire's apartment and were let inside by Alkire.

[4] The men spoke for several minutes until Smith gave Wilkerson "[a] little head nod and wink" which signaled Wilkerson to stand up and stab Alkire in the neck. *Id.* at 180. Wilkerson and Smith then exited the apartment, during which Wilkerson dropped the knife. John Tankersley, the building manager, and Robert LaCosse, Alkire's neighbor, heard the commotion in Alkire's room and found Alkire in his apartment profusely bleeding from his neck and mouth. Tankersley ran downstairs and saw Smith, Wilkerson, and Reene driving away. LaCosse called the police. After Smith dropped Reene off at his home, Reene also called the police and reported the incident. Alkire was transported to the hospital where he died from his injury. Both Smith and Wilkerson were arrested later that night.

[5] On March 12, 2020, the State charged Smith with conspiracy to commit murder, a Level 1 felony; assisting a criminal, a Level 5 felony; and murder. The charging information for Smith's murder charge stated the following:

> On or about March 7, 2020, in Tippecanoe County, State of Indiana, Floyd Wayne-Lenord Smith *and/or* Joseph Zachariah Wilkerson did knowingly or intentionally kill another human being, to-wit: Donald Lawrence Alkire[.]

Appellant's Appendix, Volume II at 16 (emphasis added). Smith did not object to the charging information or move to have it dismissed.

[6] At trial, Smith tendered an instruction for reckless homicide as a lesser-included offense of murder which read:

> The crime of reckless homicide is defined by law as follows:
>
> A person who recklessly kills another human being commits reckless homicide a Level 5 Felony.
>
> Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:
>
> 1. The Defendant
> 2. Recklessly
> 3. Killed
> 4. Donald Alkire.

Id. at 155. However, the trial court declined to give the instruction.

[7] The trial court gave the jury an instruction on the murder charge and then instructed them regarding accomplice liability stating, "A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense." *Id.* at 181. The jury found Smith guilty on all counts. At the sentencing hearing, the trial court vacated Smith's conspiracy to commit murder and assisting a criminal charges due to double jeopardy concerns and entered judgment of conviction only for murder.

[8] The trial court found Smith's history of employment and family support to be mitigating circumstances. As aggravating circumstances, the trial court found

Smith's criminal and substance abuse history and his failed attempts at rehabilitation. The trial court sentenced Smith to sixty years in the DOC. Smith now appeals. Additional facts will be provided as necessary.

Discussion and Decision

I. Instruction of Lesser-Included Offense

[9] Smith argues that the trial court erred by refusing to instruct the jury regarding the lesser-included offense of reckless homicide as a Level 5 felony. When a defendant requests a lesser-included offense instruction, the trial court applies a three-part analysis:

> (1) determine whether the lesser-included offense is inherently included in the crime charged; if not, (2) determine whether the lesser-included offense is factually included in the crime charged; and, if either, (3) determine whether a serious evidentiary dispute exists whereby the jury could conclude that the lesser offense was committed but not the greater.

Miller v. State, 720 N.E.2d 696, 702 (Ind. 1999) (citation omitted).

[10] The only element distinguishing murder and reckless homicide is the defendant's state of mind: reckless homicide occurs when the defendant "recklessly" kills another human being, and murder occurs when the killing is done "knowingly" or "intentionally." *Compare* Ind. Code § 35-42-1-5, *with* Ind. Code § 35-42-1-1(1). Reckless conduct is action taken in "plain, conscious, and unjustifiable disregard" of harm that might result and the disregard involves a

substantial deviation from acceptable standards of conduct. Ind. Code § 35-41-2-2(c). By contrast, a person engages in conduct "intentionally" if, when he engages in the conduct, it is his "conscious objective" to do so, Ind. Code § 35-41-2-2(a), and a person engages in conduct "knowingly" if, when the person engages in conduct, the person is aware of a "high probability" that he or she is doing so, Ind. Code § 35-41-2-2(b). The State concedes that reckless homicide is inherently included in murder. *See* Brief of Appellee at 17. Thus, the determinative issue here is whether the evidence produced a serious evidentiary dispute concerning Smith's state of mind that would justify giving the requested instruction.

[11] When the trial court makes a finding as to the existence or absence of a substantial evidentiary dispute, we review the rejection of a tendered instruction for an abuse of discretion. *Brown v. State*, 703 N.E.2d 1010, 1019 (Ind. 1998). This finding need be no more than a statement on the record that reflects that the trial court considered the evidence and determined no serious dispute existed. *Id.* The trial court did not make an express finding that there was not a substantial evidentiary dispute; however, the court did state that reckless homicide is "inherently a lesser included" and it is clear from the transcript that both parties made arguments regarding Smith's state of mind and whether "a serious evidentiary dispute exists[.]" Amended Transcript, Volume III at 23-24.

[12] Here, the record shows that Smith suggested to Wilkerson that they should kill Alkire. Smith gave Wilkerson a knife and "threatened [his] family" if he didn't go along with the plan to kill Alkire. Tr., Vol. II at 175. And Smith gave

Wilkerson "[a] little head nod and wink" which signaled Wilkerson to stab Alkire in the neck. *Id.* at 180. We conclude Smith's actions were conducted knowingly or intentionally and there was no appreciable evidence of recklessness and therefore no serious evidentiary dispute on the element distinguishing murder from reckless homicide. Accordingly, the trial court did not abuse its discretion by refusing to instruct the jury of the lesser-included offense of reckless homicide.

II. Charging Information

[13] Smith argues that the information charging him with murder was "defective and duplicitous[.]" Brief of Appellant at 22. Smith admits he did not object to the wording of the charging information, *see id.* at 25, nor did he move to dismiss the charge. However, Smith argues that the wording of the information charging him with murder constituted fundamental error. We have stated that

> [f]ailure to timely challenge an allegedly defective charging results in waiver unless fundamental error has occurred. Fundamental error is an extremely narrow exception to the waiver rule, and the defendant faces the heavy burden of showing that the alleged error is so prejudicial to the defendant's rights as to make a fair trial impossible. An error in a charging information is fundamental if it mislead[s] the defendant or fail[s] to give him notice of the charges against him so that he is unable to prepare a defense to the accusation.

Grimes v. State, 84 N.E.3d 635, 640 (Ind. Ct. App. 2017) (internal citations and quotations marks omitted), *trans. denied*.

[14] The State charged Smith with murder as follows:

> On or about March 7, 2020, in Tippecanoe County, State of Indiana, Floyd Wayne-Lenord Smith *and/or* Joseph Zachariah Wilkerson did knowingly or intentionally kill another human being, to-wit: Donald Lawrence Alkire[.]

Appellant's App., Vol. II at 16 (emphasis added). Smith contends the "duplicitous *and/or* structure of the charge was defective and prejudicial[,]" Br. of Appellant at 14, because "the jury could understand that if either Wilkerson, or Smith, killed Alkire, then Smith was guilty of murder[,]" *id.* at 22.

[15] "One of the well-established rules of criminal pleading is that there can be no joinder of separate and distinct offenses in one and the same count. A single count of a charging pleading may include but a single offense." *Vest v. State*, 930 N.E.2d 1221, 1225 (Ind. Ct. App. 2010) (internal citation omitted), *trans. denied.* The State may, however, allege alternative means or theories of culpability when prosecuting the defendant for a single offense. *Id.* As stated by our supreme court in *Baker v. State*:

> [A] source of concern stems from jury instructions that are delivered disjunctively or charging instruments that allege the defendant engaged in either "X" or "Y" behavior. In this regard, our jurisprudence has drawn a distinction between disjunctive instructions and charging instruments allowing for alternative *means* of committing an offense, versus alternative *separate criminal offenses*.

948 N.E.2d 1169, 1175 (Ind. 2011). There is accordingly no error when the State "merely present[s] the jury with alternative ways to find the defendant guilty as to one element, as [d]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line." *Merriweather v. State*, 128 N.E.3d 503, 511 (Ind. Ct. App. 2019) (quotations omitted), *trans. denied.*

[16] "[T]he Indiana statute governing accomplice liability does not establish it as a separate crime, but merely as a separate basis of liability for the crime charged." *Hampton v. State*, 719 N.E.2d 803, 807 (Ind. 1999). Therefore, it follows that the inclusion of accomplice liability in a charging information would not constitute a duplicitous charge. However, Smith contends that the "murder charge makes no mention of accomplice liability. It tells the jury that if either Wilkerson or Smith killed Alkire – then Smith is guilty of murder." Br. of Appellant at 24.

[17] The record is clear that the State's theory of the case was one of accomplice liability, as indicated by its voir dire questioning, *see* Tr., Vol. II at 56-57, and its opening statement and closing argument, *see id.* at 118-120; Am. Tr., Vol. III at 31-32. Further, the jury was instructed regarding murder and accomplice liability. The instruction informed the jury that before it could convict Smith, the State was required to prove each of the following elements beyond a reasonable doubt:

1. [Smith]

2. Knowingly or intentionally

3. Aided, induced, or caused

4. [] Wilkerson to commit the offense of Murder, defined as the knowing or intentional killing of another human being.

Appellant's App., Vol. II at 181.

[18] Therefore, although we believe the charging information is poorly worded, we conclude that it does not amount to fundamental error.

III. Inappropriate Sentence

[19] Smith also contends his sentence was inappropriate in light of the nature of the offense and his character.[1] Indiana Appellate Rule 7(B) provides, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Sentencing decisions rest within the discretion of the trial court and, as such, should receive

[1] Smith also argues that the trial court abused its discretion "by finding as an aggravating factor that [his] previous attempts at rehabilitation had failed." Br. of Appellant at 27. We have previously held that the failure to obtain treatment for a substance abuse problem can be an aggravating circumstance. *See Caraway v. State*, 959 N.E.2d 847, 852 (Ind. Ct. App. 2011), *trans. denied*. Further, a single aggravating circumstance is adequate to justify an enhanced sentence. *Storey v. State,* 875 N.E.2d 243, 251 (Ind. Ct. App. 2007), *trans. denied*. Smith's criminal and substance abuse history are both proper aggravating circumstances, and he does not challenge the remaining aggravators found by the trial court. We conclude that these aggravating circumstances were sufficient to support Smith's enhanced sentence. *See Edrington v. State*, 909 N.E.2d 1093, 1101 (Ind. Ct. App. 2009) (observing that it is proper to affirm a sentence where an improper aggravator is considered if we have "confidence the trial court would have imposed the same sentence" regardless) (citation omitted), *trans. denied*. Thus, even if Smith's failed attempts at rehabilitation were improperly considered, we need not remand for re-sentencing.

considerable deference. *Cardwell v. State*, 895 N.E.2d 1219, 1222 (Ind. 2008). "Such deference should prevail 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).

[20] The defendant bears the burden of demonstrating his sentence is inappropriate under the standard, *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006), and we may look to any factors in the record for such a determination, *Reis v. State*, 88 N.E.3d 1099, 1102 (Ind. Ct. App. 2017). Ultimately, "whether we regard a sentence as [in]appropriate 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." *Cardwell*, 895 N.E.2d at 1224.

[21] The advisory sentence is the starting point our legislature has selected as an appropriate sentence for the crime committed. *Childress*, 848 N.E.2d at 1081. Pursuant to Indiana Code section 35-50-2-3, a person who commits murder shall be imprisoned for a fixed term of between forty-five and sixty-five years, with an advisory sentence of fifty-five years. Here, the trial court sentenced Smith to sixty years. When evaluating a defendant's sentence that deviates from the advisory sentence, we consider whether there is anything more or less egregious about the offense as committed by the defendant that distinguishes it

from the typical offense accounted for by our legislature when it set the advisory sentence. *Moyer v. State*, 83 N.E.3d 136, 142 (Ind. Ct. App. 2017), *trans. denied.*

[22] Smith argues that his sentence was inappropriate given the nature of the offense because he "did not kill anybody." Br. of Appellant at 32. However, Smith presents no case law that suggests he should have been afforded a lesser sentence because he was found guilty under an accomplice liability theory of culpability. Here, Smith convinced Wilkerson to kill Alkire, Smith drove Wilkerson to Alkire's apartment, provided Wilkerson with the murder weapon, and threatened Wilkerson's family if he did not commit the murder. Therefore, Smith's sentence is not inappropriate given the nature of the offense.

[23] The "character of the offender" portion of the Rule 7(B) standard permits a broader consideration of the defendant's character. *Anderson v. State*, 989 N.E.2d 823, 827 (Ind. Ct. App. 2013), *trans. denied.* "A defendant's life and conduct are illustrative of his or her character." *Morris v. State*, 114 N.E.3d 531, 539 (Ind. Ct. App. 2018), *trans. denied.* And the trial court's recognition or nonrecognition of aggravators and mitigators serves as an initial guide in determining whether the sentence imposed was inappropriate. *Stephenson v. State*, 53 N.E.3d 557, 561 (Ind. Ct. App. 2016).

[24] When considering the character of the offender prong of our inquiry, one relevant consideration is the defendant's criminal history. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). "The significance of a criminal history

. . . varies based on the gravity, nature, and number of prior offenses in relation to the current offense." *Id.*

[25] Smith argues that "[t]here is no indication of previous history of violence in [his] record." Br. of Appellant at 31. However, we have held that "[e]ven a minor criminal record reflects poorly on a defendant's character[.]" *Reis*, 88 N.E.3d at 1105. As an adult, Smith has six prior misdemeanor convictions and has violated probation several times. *See* Appellant's App., Vol. III at 6-8. Although Smith's convictions are all misdemeanors they reflect poorly on his character.

[26] Therefore, given the nature of the offense and the character of the offender, we cannot say that Smith has persuaded us his sentence is inappropriate.

Conclusion

[27] We conclude the trial court did not abuse its discretion by refusing to instruct the jury of a lesser-included offense, the charging information did not constitute fundamental error, and Smith's sentence was not inappropriate. Accordingly, we affirm.

[28] Affirmed.

Riley, J., and Molter, J., concur.