

## 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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Matthew Emile Mace,  
*Appellant-Defendant,*

v.

State of Indiana,  
*Appellee-Plaintiff.*

August 30, 2022

Court of Appeals Case No.  
22A-CR-47

Appeal from the Tippecanoe  
Superior Court

The Honorable Randy J. Williams,  
Judge

Trial Court Cause No.  
79D01-2001-MR-2

**Mathias, Judge.**

- [1] Matthew Emile Mace appeals his convictions for murder, a felony, and Level 6 felony fraud following a jury trial. Mace presents two issues for our review:

1. Whether the trial court erred when it instructed the jury.
2. Whether the State committed acts of prosecutorial misconduct that cumulatively constituted fundamental error.

[2] We affirm.

### **Facts and Procedural History**

[3] On November 25, 2019, Mace and Thomas Loveless responded to a message Charles Sandefur had sent to “Ace Capone,” which was Loveless’ alias on Facebook. Tr. Vol. 2, p. 179. Mace and Loveless believed that Sandefur was a homosexual looking for companionship. Neither Mace nor Loveless was a homosexual, but Mace thought that Sandefur would be “an easy lick,” meaning that he would be easy to rob. *Id.* at 181. Mace and Loveless composed a message asking Sandefur whether he might give “Ace” some money, and, after a lengthy discussion, Sandefur invited “Ace” over to his apartment.

[4] Mace and Loveless both went to Sandefur’s apartment, and he invited them in. After the three men sat around and talked for a few hours, Mace suddenly struck Sandefur with a lamp, slit his throat with a box cutter, and stabbed him multiple times with multiple kitchen knives over the course of thirty minutes to an hour. Mace and Loveless then stole two Xboxes, a PlayStation 2, and “a bunch of games” before leaving the apartment. *Id.* at 194. A few days later, Mace and Loveless returned to Sandefur’s apartment and “grabbed the TV and [Sandefur’s] wallet.” *Id.*

- [5] On December 13, 2019, Sandefur’s landlord found his decomposing body and contacted the Lafayette Police Department. Officers searched Sandefur’s Facebook account looking for clues, and they found the messages between Sandefur and “Ace Capone” from November 25. The “Ace Capone” Facebook account was attached to an IP address connected to Mace’s cell phone. Accordingly, officers questioned both Loveless and Mace about Sandefur’s death. Ultimately, Loveless told officers that Mace had killed Sandefur, and he agreed to testify against Mace at trial.
- [6] The State charged Mace with felony murder, murder, Level 2 felony robbery resulting in serious bodily injury, Level 5 felony conspiracy to commit robbery, Level 6 fraud, and Class A misdemeanor theft. A jury found Mace guilty as charged. The trial court entered judgment of conviction only on murder and fraud, and the court sentenced Mace to an aggregate term of sixty-one years. This appeal ensued.

## **Discussion and Decision**

### ***Issue One: Jury Instructions***

- [7] Mace first contends that the trial court abused its discretion when it instructed the jury on murder, felony murder, and accomplice liability. The trial court instructed the jury in relevant part as follows:

The crime of Murder, as charged in Count I [(Felony Murder),] is defined by law as follows:

A person who knowingly or intentionally kills another human being while committing or attempting to commit robbery, commits Murder, a Class X Felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. Knowingly or intentionally
3. Killed
4. Charles Ed Sandefur
5. While committing or attempting to commit robbery, which is defined as knowingly or intentionally taking property from Charles Ed Sandefur by using or threatening use of force on Charles Ed Sandefur.

**OR**

Aiding, inducing, or causing Murder is defined by law as follows:

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense.

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. Knowingly or intentionally
3. Aided, induced, or caused
4. Thomas Loveless to commit the offense of Murder, defined as the knowing or intentional killing of another human being.

In determining whether there was sufficient evidence for purposes of accomplice liability, you may consider such factors as:

1. Presence at the scene of the crime;
2. Companionship with another at the scene of the crime;
3. Failure to oppose commission of the crime; and
4. Course of conduct before, during, and after occurrence of the crime.

A defendant's mere presence at the crime scene, or lack of opposition to a crime, standing alone, is insufficient to establish accomplice liability.

If the State failed to prove each of these elements under either Murder, or Aiding, Inducing, or Causing Murder, a Class X Felony, you must find the Defendant not guilty of Murder, a Class X Felony, as Charged in Count I.

If the State did prove each of these elements beyond a reasonable doubt under either Murder, or Aiding, Inducing, or Causing Murder, a Class X Felony, you may find the Defendant guilty of Murder, a Class X Felony, as Charged in Count I.

The crime of Murder, as charged in Count II [(Murder),] is defined by law as follows:

A person who knowingly or intentionally kills another human being commits Murder, a Class X Felony.

Before you may convict the Defendant, the State must have proved each of the following beyond a reasonable doubt:

1. The Defendant
2. Knowingly or intentionally
3. Killed
4. Charles Ed Sandefur

**OR**

Aiding, inducing, or causing Murder is defined by law as follows:

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense.

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. Knowingly or intentionally
3. Aided, induced, or caused
4. Thomas Loveless to commit the offense of Murder, defined as the knowing or intentional killing of another human being.

In determining whether there was sufficient evidence for purposes of accomplice liability, you may consider such factors as:

1. Presence at the scene of the crime;
2. Companionship with another at the scene of the crime;
3. Failure to oppose commission of the crime; and
4. Course of conduct before, during, and after occurrence of the crime.

A defendant's mere presence at the crime scene, or lack of opposition to a crime, standing alone, is insufficient to establish accomplice liability.

If the State failed to prove each of these elements under either Murder, or Aiding, Inducing, or Causing Murder, a Class X Felony, you must find the Defendant not guilty of Murder, a Class X Felony, as Charged in Count II.

If the State did prove each of these elements beyond a reasonable doubt under either Murder, or Aiding, Inducing, or Causing Murder, a Class X Felony, you may find the Defendant guilty of Murder, a Class X Felony, as Charged in Count II.

Appellant's App. Vol. 2, pp. 125-26. Mace contends that the instruction for felony murder is an incorrect statement of the law in that it does not require proof that he assisted Loveless in the commission of the robbery. And he contends that the instructions for both felony murder and murder omit the "voluntary conduct" element of accomplice liability and improperly incorporate a sufficiency of the evidence test from case law. Appellant's Br. p. 23.

[8] The State contends that Mace has waived this issue for our review, and we must agree. To preserve for appeal an alleged error in instructing the jury, the defendant must "object to the proposed instruction, and such objection must be 'sufficiently clear and specific to inform the trial court of the claimed error and to prevent inadvertent error.'" *Minor v. State*, 36 N.E.3d 1065, 1072 (Ind. Ct. App. 2015) (quoting *Fry v. State*, 748 N.E.2d 369, 373 (Ind. 2001)), *trans. denied*. Relatedly, it is well settled that a defendant may not object to an instruction upon one ground at trial and present a different ground upon appeal. *See Morgan v. State*, 755 N.E.2d 1070, 1077 (Ind. 2001).

[9] Here, in his brief on appeal, Mace directs us to a single page of the transcript where he objected to the court's final instructions on murder, felony murder, and accomplice liability. The entirety of Mace's objection to these instructions reads as follows:

[Defense counsel]: The defense maintains the objection to all three of the state's proposed final instructions[;] however we take no issue as indicated.

THE COURT: With the manner in which I put it together?<sup>[1]</sup>

[Defense counsel]: Correct.

Tr. Vol. 3, p. 135. Because Mace did not state the basis for his objection with any clarity or specificity, he did not preserve the alleged error for our review. *Minor*, 36 N.E.3d at 1072. Indeed, Mace has not shown that he objected to the instructions on the same grounds he now raises on appeal. *Morgan*, 755 N.E.2d at 1077. The issue is waived.

[10] Waiver notwithstanding, we agree with the State that Mace has not shown reversible error.

Because instructing the jury is a matter within the sound discretion of the trial court, we will reverse a trial court's decision to tender or reject a jury instruction only if there is an abuse of that discretion. *Washington v. State*, 997 N.E.2d 342, 345 (Ind. 2013). We determine whether the instruction states the law correctly, whether it is supported by record evidence, and whether its substance is covered by other instructions. *Id.* at 345-46. "Jury instructions are to be considered as a whole and in reference to each other; error in a particular instruction will not result in reversal unless the entire jury charge misleads the jury as to the law in the case." *Whitney v. State*, 750 N.E.2d 342, 344 (Ind. 2001) (quoting *Edgecomb v. State*, 673 N.E.2d 1185, 1196 (Ind. 1996)).

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<sup>1</sup> The trial court "melded" together the State's proposed instructions into one instruction to avoid potential confusion. Tr. Vol. 3, p. 134.



*Thompson v. State*, 119 N.E.3d 232 (Ind. Ct. App. 2018). Here, the challenged instructions do not misstate the law and, taken as a whole, the jury instructions did not mislead the jury as to the law on murder, felony murder, or accomplice liability. The trial court did not abuse its discretion when it instructed the jury.

### ***Issue Two: Prosecutorial Misconduct***

[11] Mace next contends that the State made three statements during its closing argument that amount to prosecutorial misconduct and cumulatively constituted fundamental error. Mace did not object to any of the challenged statements. When a party does not properly preserve a claim of prosecutorial misconduct, “the defendant must establish not only the grounds for the misconduct but also the additional grounds for fundamental error. Fundamental error is an extremely narrow exception that allows a defendant to avoid waiver of an issue.” *Sobolewski v. State*, 889 N.E.2d 849, 856 (Ind. Ct. App. 2008) (citing *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006)).

[T]o establish fundamental error, the defendant must show that, under the circumstances, the trial judge erred in not sua sponte raising the issue because alleged errors (a) constitute clearly blatant violations of basic and elementary principles of due process and (b) present an undeniable and substantial potential for harm. The element of such harm is not established by the fact of ultimate conviction but rather depends upon whether [the defendant’s] right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise would have been entitled. In evaluating the issue of fundamental error, our task in this case is to look at the alleged misconduct in the context of all that happened and all relevant information given to the jury—including evidence

admitted at trial, closing argument, and jury instructions—to determine whether the misconduct had such an undeniable and substantial effect on the jury’s decision that a fair trial was impossible.

*Ryan v. State*, 9 N.E.3d 663, 667-68 (Ind. 2014) (internal quotation marks and citations omitted).

[12] The statements Mace now challenges fall into three broad categories: (1) referring to Mace’s failure to testify, (2) vouching for witness credibility, and (3) reading case law to the jury. We address each argument in turn.

#### *Failure to Testify*

[13] Mace asserts that the prosecutor made an improper reference to his failure to testify during his closing argument. The prosecutor was describing the evidence that Mace and Loveless had searched Sandefur’s body looking for money when the prosecutor stated as follows:

The shoes were removed, once again appears [sic] to be removed after the vicious, violent attack that lasted 30 minutes to an hour. Why would someone remove a dead man’s shoes? I’ve been doing it a long time[,] probably since I was a kid, sock money. Some people still carry cash in their socks, shoes, and other areas. Seeing if he had any sock money. Once again[,] that’s just based upon the evidence as it’s presented. It seems to be reasonable[,] but it’s up to you to determine whether or not it’s a reasonable explanation. I contend to you that there is no alternative. *What’s the alternative explanation[?]*

Tr. Vol. 3, p. 145 (emphasis added). Mace contends that the reference to a lack of an “alternative explanation” for the removal of Sandefur’s shoes is an impermissible comment on his failure to testify at trial. We cannot agree.

[14] As this Court has stated,

“The Fifth Amendment privilege against compulsory self-incrimination is violated when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from the defendant’s silence.” *Moore v. State*, 669 N.E.2d 733, 739 (Ind. 1996). However, “[t]he Indiana Supreme Court has indicated that if in its totality the prosecutor’s comment is addressed to other evidence rather than the defendant’s failure to testify, it is not grounds for reversal.” *Channell v. State*, 658 N.E.2d 925, 932 (Ind. Ct. App. 1995), *trans. denied* (1996). Comment on the lack of evidence by the defense concerning otherwise incriminating evidence against him is proper “as long as the State focuses on the absence of any evidence to contradict the State’s evidence and not on the accused’s failure to testify.” *Martinez v. State*, 549 N.E.2d 1026, 1028 (Ind. 1990).

*Moreland v. State*, 701 N.E.2d 288, 293 (Ind. Ct. App. 1998).

[15] In *Moreland*, the prosecutor pointed out during his closing argument that the State’s evidence was “unrefuted.” *Id.* On appeal, the defendant alleged that that statement “could only be interpreted as an adverse comment on his privilege to remain silent, and as such, violated his Fifth Amendment rights.” *Id.* We disagreed and held that the remark “focused on the totality of evidence, not on Moreland’s failure to testify. It was not improper and does not constitute prosecutorial misconduct.” *Id.* at 294. Likewise, here, the prosecutor’s remark

on the lack of an “alternative explanation” for Sandefur’s shoes having been removed focused on the totality of evidence, not on Mace’s failure to testify, and it did not constitute prosecutorial misconduct.

### *Vouching*

[16] Mace also states that the prosecutor made remarks during closing argument that offered his “personal opinion as to the strength of the case,” which, Mace asserts, constituted improper vouching for the evidence. Appellant’s Br. p. 29. The prosecutor stated as follows:

So, if you believe that [Mace] was the principal actor, if you believe that he killed Mr. Sandefur beyond a reasonable doubt [-] not all doubt, reasonable doubt [-] and you convict him of murder and everything that follows, now let’s say I don’t know if he was the principle or the accomplice. *I definitely believe that he is guilty of felony murder.* There was a robbery, and someone died. Well, was it Thomas Loveless or Mr. Mace that punched all of the knives? Maybe it was both of them? Maybe it was one or the other. I definitely believe [Mace] was involved. *I definitely believe that he is guilty of felony murder* but I don’t know which one is which. Doesn’t matter.

Tr. Vol. 3, p. 151 (emphases added).

[17] Mace points out that [Indiana Professional Conduct Rule 3.4\(e\)](#) provides that, during a trial, an attorney may not “state a personal opinion as to the . . . credibility of a witness . . . or the guilt or innocence of an accused.” But our Supreme Court has held that a prosecutor *may* “comment on the credibility of

the witnesses as long as the assertions are based on reasons which arise from the evidence.” *Ryan v. State*, 9 N.E.3d 663, 671 (Ind. 2014) (citation omitted).

[18] In *Merritte v. State*, the prosecutor stated in closing argument, “I don’t have to be here in court if I don’t believe these men are guilty. It’s my decision whether to take somebody to trial or not, and I’m here.” 438 N.E.2d 754, 756 (Ind. Ct. App. 1982). On appeal, our Supreme Court held that,

[v]iewing the prosecutor’s argument as a whole in this case, we find the challenged statement was based on the prosecutor’s analysis of the evidence. It was not intended as, nor could it reasonably be taken to be, an inference the prosecutor had some special knowledge unrevealed to the jury that pointed more decisively to appellants’ guilt. Prior to the making of the statement the prosecutor had summarized the evidence adduced against appellants and the challenged statement was no more than a statement of her conclusions based on the evidence adduced at the trial. There was no error in this regard. . . .

*Id.* at 757. Likewise, here, the prosecutor’s comments do not suggest any special knowledge of Mace’s guilt, and his argument, taken as a whole, shows that the comments were based on the prosecutor’s analysis of the evidence.

#### *Sufficiency of the Evidence Case Law*

[19] Finally, Mace contends that it was “improper for the prosecutor to suggest that an appellate sufficiency of the evidence case lended [sic] support for a conviction in Mace’s case.” Appellant’s Br. p. 32. In particular, Mace challenges the following excerpt from the prosecutor’s closing argument:

So now one thing felony murder states that the defendant knowingly or intentionally killed Charles Sandefur, while committing, attempting to commit, so once again this is – the case law is just to help you show that. It doesn't matter whether you're an accomplice or whether you're the princip[al], you[re the] actual perpetrator.

The case in which two defendants appealed their convictions of felony murder, there was sufficient evidence [the second defendant participated in the crime by knocking on the doors of the target and victims and the second defendant also functioned as a lookout so neither of these guys are the princip[al]. . . . So, what does an accomplice mean? Presence at the scene of the crime, companionship of one another at the scene of the crime, (inaudible) post commission of [the] crime, and conduct before, during and after the occurrence of the crime.

Tr. Vol. 3, pp. 149-50. Mace reiterates that the trial court improperly included a sufficiency of the evidence standard in the final jury instructions. Thus, he asserts that the prosecutor improperly referred to case law regarding that standard in his closing argument.

[20] In support of his contention, Mace cites *Hernandez v. State*, 439 N.E.2d 625, 630 (Ind. 1982), where our Supreme Court stated that “reading from decisions to the jury is proper in final argument so long as it is clear that the prosecutor is reading from or referring to a separate case, so as to not mislead or confuse the jury.” Here, we hold that the prosecutor’s remarks about case law to help explain accomplice liability were not likely to mislead or confuse the jury. Mace has not shown misconduct on this issue.

[21] In sum, Mace has not shown that the challenged remarks constitute prosecutorial misconduct, either individually or cumulatively. Even assuming the remarks were improper, Mace has not shown that the trial judge erred in not sua sponte addressing the remarks because they (a) constitute clearly blatant violations of basic and elementary principles of due process and (b) present an undeniable and substantial potential for harm. *See Ryan*, 9 N.E.3d at 668. Accordingly, Mace has not established fundamental error.

[22] Affirmed.

Robb, J., and Brown, J., concur.