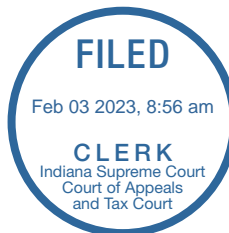


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Justin M. Blake,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 3, 2023

Court of Appeals Case No.
22A-CR-789

Appeal from the Morgan Superior
Court

The Honorable Peter R. Foley,
Judge

Trial Court Cause No.
55D01-2009-MR-1462

Memorandum Decision by Judge Weissmann
Judges May and Crone concur.

Weissmann, Judge.

- [1] Justin Blake robbed and then murdered Alex Jackson in a futile attempt to cover up his past crimes. Blake now appeals his convictions for robbery and murder, arguing that the trial court erred in admitting prejudicial evidence during his jury trial and in instructing the jury on accomplice liability. Blake also claims his convictions for murder and robbery constitute double jeopardy. Finding no error, we affirm.

Facts

- [2] Blake, Jackson, Britney Overton, and an individual identified only as K.J., drove around Indianapolis in Jackson's rental car, stopping to shoplift and commit armed robbery. Becoming paranoid that Jackson would "snitch" about their crimes, Blake directed the car to a desolate area. Tr. Vol. VII, p. 36. When they arrived, Blake and K.J. exited the car and forced Jackson out at gunpoint. Overton remained in the car, from which he heard Jackson scream followed by six or seven gunshots. Blake and K.J. then jumped back into the car and told Overton to drive. After dropping off K.J., Blake confessed to Overton that he was the one who shot Jackson. Blake kept Jackson's rental car for several days before crashing it while running from the police.

[3] The State charged Blake with murder, felony murder, and Level 2 felony robbery resulting in serious bodily injury.¹ At Blake’s jury trial, a central piece of evidence was State’s Exhibit 49, which contained cellphone location data from Overton’s cellphone. The State and Blake had stipulated that the data was accurate and admissible. But when the State moved to introduce State’s Exhibit 49 at trial, Blake objected. According to Blake, the exhibit given to him in discovery was different from State’s Exhibit 49.

[4] After the jury was excused, Blake explained that the version he received in discovery had “green indicators of the towers,” but State’s Exhibit 49 included “red circles” to indicate where the device traveled. Tr. Vol. II, pp. 245–46. The trial court overruled Blake’s objection, reasoning that the parties stipulated to the underlying data from which the animation was created and the animation was not prejudicial. The trial court granted a brief continuance, however, to give Blake additional time to review the exhibit.

[5] Also at trial, the State asked for an instruction on accomplice liability. Blake objected, arguing that the instruction was not warranted because the State’s evidence showed Blake was the gunman, not an accomplice. Blake also noted that the State’s tendered instruction alleged the killer to be Overton “and/or” K.J. App. Vol. II, pp. 236-37. According to Blake, the instruction’s failure to

¹ The robbery charge referred to Blake’s taking of Jackson’s rental car in connection with his murder, not the separate armed robbery the two committed together.

specifically allege the principal murderer created a jury unanimity problem. The court disagreed with both arguments and read the instruction to the jury.

- [6] The jury found Blake guilty as charged, but the trial court did not enter judgment of conviction on the felony murder charge over double jeopardy concerns. The court entered judgment of conviction for murder and Level 5 felony robbery, a lesser included offense to the Level 2 felony robbery charge. The court then sentenced Blake to an aggregate term of 61 years imprisonment.

Discussion and Decision

- [7] Blake appeals his convictions, arguing that the trial court erred in admitting State's Exhibit 49 and in giving the accomplice liability jury instruction. He also claims his dual convictions for murder and Level 5 felony robbery constitute double jeopardy. Finding the trial court did not abuse its discretion in admitting the cellphone evidence or in instructing the jury, and concluding that no double jeopardy violation occurred, we affirm.

I. Admission of State's Exhibit 49

- [8] Blake argues the trial court erred in admitting State's Exhibit 49, an animation tracking Overton's cellphone tower data the night of the murder. It is undisputed the State inadvertently gave Blake an incomplete version of the exhibit prior to his trial. This was a discovery violation. But not all discovery violations require the evidence to be excluded. Indeed, the favored remedy for a discovery violation is a continuance, not exclusion. *Sisson v. State*, 985 N.E.2d 1, 14 (Ind. Ct. App. 2012). Recognizing this, the trial court admitted State's

Exhibit 49 into evidence but granted Blake a brief continuance to examine the full exhibit. This was not error.

[9] Trial courts have “broad latitude” to handle evidentiary and discovery matters. *Cain v. State*, 955 N.E.2d 714, 719 (Ind. 2011). We review a discovery violation for an abuse of the trial court’s discretion involving clear error and resulting prejudice. *Berry v. State*, 715 N.E.2d 864, 866 (Ind. 1999). “A claim of error in the exclusion or admission of evidence will not prevail on appeal unless the error affects the substantial rights of the moving party.” *Nicholson v. State*, 963 N.E.2d 1096, 1099 (Ind. 2012) (quoting *McCarthy v. State*, 749 N.E.2d 528, 536 (Ind. 2001)).

[10] Both parties agree that the discovery exhibit, tendered to Blake pretrial, contained the same underlying data and information as the exhibit shown at the trial. The only difference between the two exhibits was the appearance of red circles on the trial exhibit showing the general location of Overton’s cellphone. State’s Exh. 49; Tr. Vol. VII, pp. 245-48. But even without the red circles, the green marks showing the cellphone towers, which appeared on both the trial and discovery exhibits, tended to show roughly where Overton was already. Thus, the only change to the exhibit entailed visual details, not the sort of omission impacting Blake’s substantial rights. Any prejudice to Blake was not significant enough to require the “extreme remedy” of excluding the exhibit. *Berry*, 715 N.E.2d at 866.

- [11] Blake’s reliance on *State v. Lyons* is misplaced. 189 N.E.3d 605 (Ind. Ct. App. 2022). In *Lyons*, the trial court excluded evidence stemming from a *Brady* violation, which consisted of the State’s representation that the admissibility of a polygraph examination was stipulated when it ultimately was not. *Id.* at 609-11. This Court affirmed the exclusion, finding the discovery violation prejudicial because the defendant might have altered his defense if he had known about the error. *Id.* at 611; *cf. Berry*, 715 N.E.2d at 866 (affirming the trial court’s admission of evidence following discovery violation where the error “did not appear to make a difference [in defendant’s] trial strategy or tactics”).
- [12] Unlike the facts in *Lyons*, Blake stipulated before trial that the cell phone tower data in State’s Exhibit 49 was correct. And since the change in the exhibit did not concern the underlying data or information, Blake has no basis to argue the change affected his trial strategy. Accordingly, we find no abuse of the trial court’s discretion.

II. Accomplice Liability Instruction

- [13] Blake advances two arguments for how the trial court erred in instructing the jury. First, Blake alleges that the given accomplice liability instruction was not supported by the record. Second, he asserts that the instruction’s use of the disjunctive term “and/or” tainted the jury’s deliberations by allowing them to convict Blake without a unanimous theory of his guilt.
- [14] We review a trial court’s jury instruction for an abuse of discretion. *Brooks v. State*, 895 N.E.2d 130, 132 (Ind. Ct. App. 2008). A trial court abuses its

discretion in instructing the jury when the given instruction was erroneous and the instructions, taken as a whole, misstate the law or otherwise mislead the jury. *Id.* But even an erroneous jury instruction does not require reversal of the defendant's conviction "where [that] conviction is clearly sustained by the evidence, and the instruction would not likely have impacted the jury's verdict." *Minor v. State*, 36 N.E.3d 1065, 1072 (Ind. Ct. App. 2015). A defendant must show that the error prejudiced his substantial rights. *Id.*

[15] At the close of evidence, the trial court read the following jury instruction on accomplice liability:

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
3. Aided, induced or caused
4. "KJ" **and/or** Britney Overton to commit the offense of murder, defined as knowingly or intentionally killing another human being.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of aiding, inducing or causing murder, a felony, charged in Count 1.

Before you may convict the Defendant of this crime, you must find there is evidence of the Defendant's affirmative conduct,

either in the form of acts or words, from which an inference of a common design or purpose may be reasonably drawn. The Defendant's conduct must have been voluntary and in concert with the other person.

The Defendant's mere presence at the scene of the crime, or mere acquiescence in the commission of the crime, is insufficient to convict for aiding, inducing or causing the crime charged in Count 1. A person may be convicted of aiding, inducing or causing murder even if the other person has not been prosecuted for the murder, has not been convicted of the murder, or has been acquitted of the murder.

App. Vol. II, pp. 236-37 (emphasis added).

[16] Sufficient evidence supported the trial court's decision to instruct the jury on the issue of accomplice liability. We note at first that accomplice liability is not a "separate crime" but a "separate basis for liability." *Hampton v. State*, 719 N.E.2d 803, 807 (Ind. Ct. App. 1999) (describing Indiana's accomplice liability statute, Ind. Code § 35-41-2-4). Hence Blake "would have been equally guilty of murder whether he acted as the principal shooter or merely an accomplice." *Taylor v. State*, 840 N.E.2d 324, 333 (Ind. 2006). Given the lack of eyewitness testimony or other evidence, the State was justified in advancing multiple theories for Blake's culpability in Jackson's murder. Just because the State's principal theory was that Blake pulled the trigger did not prevent the jury from finding Blake was an accomplice to another shooter instead.

[17] The instruction also did not violate the requirement of jury unanimity by contemplating that either K.J. or Overton could have murdered Jackson. Our

Supreme Court has made clear that the State does not err by offering “alternative ways to find the defendant guilty as to *one element*.” *Cliver v. State*, 666 N.E.2d 59, 67 (Ind. 1996). That is precisely what the State did here. The jury could have reasonably believed that either Overton or K.J. murdered Jackson. While the jury must be unanimous as to the finding of the defendant’s ultimate guilt, the jury “is not required [to be unanimous] as to the theory of the defendant’s culpability.” *Taylor*, 840 N.E.2d at 333. We find no abuse of discretion.

III. Double Jeopardy

[18] Lastly, Blake contends his dual convictions for murder and Level 5 felony robbery violate his rights against double jeopardy. Reviewing this issue de novo, *Wadle v. State*, 151 N.E.3d 227, 237 (Ind. 2020), we find no double jeopardy violation.

[19] When a defendant alleges that he has been convicted under “multiple statutes with common elements” for committing “a single criminal act,” we apply the analytical framework established by our Supreme Court in *Wadle*. As summarized by this Court:

First, we look to the statutes. If they explicitly allow for multiple punishments, no double jeopardy occurs, and our inquiry ends. If the statutes are unclear, we apply Indiana’s included-offense statute. If either offense is included in the other, we proceed to the second step and ask whether the defendant’s actions are “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” If the

facts show only a single crime, judgment may not be entered on the included offense.

Carranza v. State, 184 N.E.3d 712, 716 (Ind. Ct. App. 2022) (internal citations omitted).

[20] The first step of the analysis is straightforward here. As both parties agree, and this Court has already determined, neither the murder statute, Ind. Code § 35-42-1-1(1), nor the robbery statute, Ind. Code § 35-42-5-1, are clear on whether they allow multiple punishments. *Diaz v. State*, 158 N.E.3d 363, 370 (Ind. Ct. App. 2020). Blake therefore argues that Level 5 felony robbery is a lesser included offense of murder, a claim this Court has already rejected.

[21] In *Diaz*, we analyzed the murder and Level 5 felony robbery statutes under Indiana’s lesser included offense statute, Ind. Code § 35-31.5-2-168(1)-(3). 158 N.E.3d at 370. We concluded “each offense requires some conduct the other does not”—namely that “murder requires a killing” and “Level 5 felony robbery requires the taking of property.” *Id.* Thus, neither offense is included in the other. Blake asks us to reject this conclusion because the victim of his murder and robbery was the same person. But the same was true in *Diaz*. *Id.* at 367. Blake has failed to demonstrate that his Level 5 felony robbery conviction is a lesser included offense of murder for purposes of double jeopardy.²

² Contrary to Blake’s assertion that “[r]egardless” of the disposition of the statutory analysis the court continues to the next step, Appellant’s Br., p. 32, *Wadle* states “[i]f neither offense is an included offense of the other (either inherently or as charged), there is no violation of double jeopardy.” 151 N.E.3d at 248.

Conclusion

[22] Finding no abuses of discretion in the trial court's handling of the discovery violation or the accomplice liability jury instruction and concluding that Blake's convictions for murder and Level 5 felony robbery do not constitute double jeopardy, we affirm.

May, J., and Crone, J., concur.