MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Oliver Bwalya,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 24, 2023

Court of Appeals Case No.
22A-CR-1344

Appeal from the
St. Joseph Superior Court

The Honorable
John M. Marnocha, Judge

Trial Court Case Nos.
71D02-1907-F6-715
71D02-2010-MR-18

Memorandum Decision by Senior Judge Shepard
Judges Riley and Tavitas concur.

Shepard, Senior Judge.

[1] Following a jury trial, Oliver Bwalya appeals his conviction for murder,[1] a felony. Concluding that the trial court did not abuse its discretion by admitting evidence or instructing the jury, and that sufficient evidence supports his conviction, we affirm.

Facts and Procedural History

[2] On February 28, 2020, Bwalya texted Oluwatomipe Jeremiah Makanjuola ("Jerry"), Adonis Harris ("Donnie"), and James Birtcher ("James"), "on gang be here and have sticks bro I got 3 planned out hits already the rest are just optional but the 3 100%." Ex. Vol. III, p. 59 (State's Ex. 157). A "hit" refers to "ripping off a drug dealer" by either stealing their drugs or their money. Tr. Vol. II, p. 175.

[3] Bwalya's first "hit" was planned to take place in Michigan where the four would rob a drug dealer named Colin, taking his drugs and money. When the men went to Colin's address, the only person present was a woman whom Bwalya did not know. Jerry ran inside, grabbing a box of Colin's marijuana, and Donnie pulled his gun, pointing it at the woman's head. Bwalya, who was scared, left the house and heard a gunshot, believing that Donnie might have shot the woman. Bwalya waited for the others to return to the car before

[1] Ind. Code § 35-42-1-1 (2018).

driving to Camp Wagner to switch vehicles from Bwalya's Prius to Jerry's red Toyota.

[4] A short time later, Bwalya contacted Alan Diaz, a dealer he had used in the past, and asked him if he could purchase a quarter pound of marijuana. Bwalya's second "hit" called for the group to drive to South Bend to meet Diaz who had one ounce of marijuana. The group had mingled real money with counterfeit money to get the marijuana for less than the purchase price. Bwalya used Jerry's phone to text Diaz, "yo its prince im here for the zip." State's Ex. 160; Ex. Vol. III p. 61. A "zip" is one ounce. Bwalya 2 at 16:55-17:11.[2] Diaz replied, "bet bro" and met Bwalya in his driveway. State's Ex. 160, Exhibit Vol. III, p. 61.

[5] Bwalya exchanged the commingled money for the marijuana and returned to the car, hearing Diaz yelling at him. In response, Jerry, Donnie, and James drew their guns and shot at Diaz. Jerry's shot hit Diaz in the abdomen causing him to drop to the ground after which Bwalya and the group fled. Diaz later died as a result of the gunshot wound.

[6] Meanwhile, Bwalya, Donnie, Jerry, and James drove to Chicago. James noticed that there were spent shell casings in the car. The group collected most of the casings, placed them in a backpack and then discarded it. At some point,

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[2] There is no exhibit number for three video exhibits, entitled Bwalya 1, 2, and 3, respectively. We refer to them by their identifier.

Bwalya and Jerry separated from Donnie and James and returned to Michigan to retrieve Bwalya's car, which had been towed. Bwalya went to the Sheriff's Department in Cass County Michigan to recover his vehicle, but officers took him into custody as a suspect in the home invasion of the drug dealer Colin.

[7] The State charged Bwalya with aiding, inducing, or causing the murder of Diaz, and he was held without bond. At a bond reduction hearing, Bwalya's counsel argued that Bwalya was "neither armed with a firearm nor was he the one that fired the shots, nor was he the one that gave any sort of direction to individuals that did." Supp. Tr. Vol, II, p. 22. Essentially, Bwalya argued that he did not have "the culpability that would be required under the aiding, inducing, or causing statute." *Id.* The court took the matter under advisement, later granting Bwalya's motion and setting bond.

[8] Prior to trial, the State filed a notice of intent to offer Rule 404(b) evidence, namely, that Bwalya and his "accomplices committed a home invasion with subterfuge and armed robbery in Michigan," arguing that the evidence would show Bwalya's intent, plan, modus operandi, identity, absence of mistake, and lack of accident. Appellant's App. Vol. II, p. 52.

[9] Over Bwalya's objection, the trial court concluded that the evidence was relevant under Rule 401 and that a Rule 404(b) exception applied, given Bwalya's statements and counsel's arguments at the bond hearing. The court said,

> [T]he theory of liability that although the defendant did not pull the trigger, he certainly aided, induced, or caused this offense and the murder. In that theory of liability, the defendant knowingly or intentionally aiding, inducing, or causing is an important issue, particularly the idea of knowledge which is defined as a high probability of doing so. His role in this even requires, I think, some testimony as to what the plan was about and what his knowledge was and what flows from there. Knowledge or intent, of course, is a jury question; but I don't think the jury can fairly determine the knowledge of the defendant in this case was as it related to aiding, inducing, and causing without some testimony concerning the prior event. It goes directly to that issue. And here, the facts are interwoven.

Supp. Tr. Vol. II, p. 35. The court also concluded that there was no risk of unfair prejudice under Rule 403 because the evidence: (1) would not confuse the issues or mislead the jury; (2) "helps the jury get a clear idea of what was going on[,]" *id.* at 37; and (3) could be introduced after an admonishment.

[10] At trial, the State called Cass County Sheriff's Department Detective Zachary Nixon to testify about that evidence. Prior to that testimony, the court admonished the jury as follows:

> Ladies and gentlemen, before you hear the next witness in this case, I want to read to you what's called an admonition. An admonition is simply an instruction by the Court as it relates to certain evidence the jury may hear in which the Court tells the jury -- kind of limits the scope of what that evidence can be used for and tells the jury the purposes of certain evidence that you may hear. And I'll read it again. I'll try to read it slowly; but if you want to hear it again after I read it, I'll do that as well. It's as follows: You may hear testimony that the defendant may have been involved in other activity in the State of Michigan prior to

> the allegations which are at issue in this case. That evidence is not admitted to prove the defendant's character or propensity to commit crimes but is admitted as it may be relevant to intent, plan, absence of mistake, and lack of accident.

Tr. Vol. II, pp. 49-50.

[11] Next, Bwalya objected to the court's proposed preliminary instruction on aiding, inducing, and causing the offense of murder, arguing that the pattern jury instruction should be given instead. The court's instruction read as follows:

> **I.C. 35-42-1-1. Murder.**
>
> A person who knowingly or intentionally kills another human being commits murder.
>
> **I.C. 35-41-2-4. Aiding, Inducing, or causing an offense.**
>
> A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:
>
> 1. Has not been prosecuted for the offense;
>
> 2. Has not been convicted of the offense; or
>
> 3. Has been acquitted of the offense.
>
> **A further, although non-statutory, explanation of "aiding, inducing, or causing" is as follows:**
>
> The acts of one person are attributable to all who are knowingly or intentionally acting together during the commission of a crime. Accordingly, although the state need not prove, beyond a reasonable doubt, that the defendant personally, and acting by himself, committed all of the elements of the crime or crimes with which he is charged, the state must prove, beyond a reasonable doubt, that the defendant knowingly or intentionally

> engaged in some affirmative conduct aiding, inducing, or causing another person to commit the charged crime or crimes, and that the defendant and another person or persons knowing or intentionally acting together committed all of the elements of the crime or crimes with which the defendant is charged. To be found guilty, a person does not have to personally participate in the crime, nor does he have to be present when the crime was committed. Merely being present at the scene of the crime is not sufficient to prove that a person aided, induced, or caused the crime. Failure to oppose the commission of the crime is also insufficient to prove aiding, inducing, or causing another to commit the crime. But presence at the scene of the crime and failure to oppose the crime's commission are factors, which may be considered in determining whether there was aiding, inducing, or causing another to commit the crime.

Appellant's App. Vol. II, pp. 58-59, 69-70. Bwalya objected to the further explanation.

[12] At the conclusion of the trial, the jury found Bwalya guilty as charged, and the court sentenced Bwalya to serve fifty-five years executed.

Discussion and Decision

I. Admission of Rule 404(b)(2) Evidence

[13] The centerpiece of Bwalya's defense was his lack of intent inasmuch as "his plan to rip off a drug dealer with counterfeit money had absolutely nothing to do with the killing that occurred" and that "he had no gun, nor did he shoot anyone." Appellant's Br. p. 9. Because Bwalya had placed his lack of intent at issue as early on as his bond hearing, the court concluded that the evidence of

the incidents that transpired leading up to the Michigan crime were relevant and any prejudice could be addressed with a limiting instruction. We agree.

[14] "The admission or exclusion of evidence lies within the sound discretion of the trial court and is afforded great deference on appeal." *Turner v. State*, 183 N.E.3d 346, 352 (Ind. Ct. App. 2022) (quoting *Whiteside v. State*, 853 N.E.2d 1021, 1025 (Ind. Ct. App. 2006), *trans. denied*), *trans. denied*. "We will reverse the trial court's ruling on the admissibility of evidence only for an abuse of discretion." *Id.* "An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id.*

[15] The jury was asked to decide whether Bwalya had aided, induced, or caused Diaz's murder beyond a reasonable doubt. But to do so, the jury needed to understand the origins of Bwalya's three-part plan and his part in them for context. As the trial court aptly observed, knowledge or intent, which Bwalya squarely disputed, could only be explained in connection with the plan that began first in Michigan. And the State's "reliable assurance" that Bwalya affirmatively contested the issue of intent came from counsel's arguments in the bond hearing. *See Wickizer v. State*, 626 N.E.2d 795, 799 (Ind. 1993) ("The intent exception in Evid. R. 404(b) will be available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent.").

[16] The evidence was relevant under Rule 401 because it established Bwalya's involvement in setting up the three hits and his further contribution to the plan by texting instructions to Jerry, Donnie, and James to bring their guns. Bwalya identified the targets and personally set up the deal with Diaz. The use of the guns in Michigan was relevant to show the lengths to which Jerry, Donnie, or James would go to carry out Bwalya's plan, which included the hit in Indiana. Moreover, because Bwalya had already presented a contrary intent, the State had "reliable assurance" that Bwalya would affirmatively contest evidence of his intent at trial. *See Wikizer*, 626 N.E.2d at 799. Further, the court's limiting instruction reduced any risk of unfair prejudice to Bwalya under Rule 403. And "[j]urors are presumed to follow a trial court's instructions." *See Ward v. State*, 138 N.E.3d 268, 274 (Ind. Ct. App. 2019).

[17] Assuming arguendo that the court's decision allowing the evidence was an abuse of discretion, the error, if any, was harmless. As discussed in more detail below, there is sufficient evidence to show that Bwalya knowingly or intentionally aided, induced, or caused Jerry, Donnie, or James to kill Diaz. The evidence showed that Bwalya identified Diaz as a target and set up the deal with him. Statements from the Bwalya Exhibits 1, 2, and 3 established that Bwalya knew that he and the group were trying to short Diaz's purchase price by using counterfeit bills to pay for the marijuana, that Diaz carried a weapon, and that Jerry, Donnie, or James would use their weapons if necessary.

[18] This is pertinent because we will not reverse a conviction if the error is harmless. *Turner v. State*, 953 N.E.2d 1039 (Ind. 2011). Instead, "errors in the

admission of evidence are to be disregarded unless they affect the substantial rights of a party." *Id.* at 1059. Our review of the effect of the evidentiary ruling on a defendant's substantial rights looks "to the probable impact on the fact finder." *Id.* Given the substantial independent evidence of guilt present here, there is "no substantial likelihood the challenged evidence contributed to the conviction." *Id.* There is no reversible error.

II. Instructional Error

[19] Next, Bwalya says that the court abused its discretion in instructing the jury about aiding, inducing, or causing an offense. We review a trial court's manner of instructing a jury for an abuse of discretion. *Albores v. State*, 987 N.E.2d 98 (Ind. Ct. App. 2013), *trans. denied*. Our consideration looks at whether the instruction (1) correctly states the law, (2) is supported by the evidence, and (3) is covered in substance by other instructions that are given. *Id.*

[20] Though Bwalya concedes that the court's instruction was a correct statement of the law, he argues that the court abused its discretion by inviting "the jury to find Bwalya guilty of aiding without requiring the [State to] prove that Bwalya's specific intent was the knowing/intentional killing of Diaz." Appellant's Br. p. 15. This *Spradlin*-like[3] argument is misplaced here, however, because "[t]he State alleged the commission of a completed murder." *Watson v. State*, 999 N.E.2d 968, 971 (Ind. Ct. App. 2013). '"The defendant must have had the

[3] *Spradlin v. State*, 569 N.E.2d 948 (Ind. 1991).

specific intent to commit murder in order to be found guilty of attempt[ed] murder. There is no comparable requirement for the murder charge."' *Id.* (quoting *Echols v. State*, 722 N.E.2d 805, 808 (Ind. 2000)). The "requirement of a 'specific intent to kill' applies only in attempted murder cases, and not in murder cases where 'the defendant may be convicted upon a showing of either an intentional or knowing killing.'" *Garrett v. State*, 714 N.E.2d 618, 622 (Ind. 1999). Thus, the court did not abuse its discretion.

[21] Nor did the court abuse its discretion by including language not contained in the pattern jury instruction. As our Supreme Court acknowledged in *Campbell v. State*, 19 N.E.3d 271, 277 (Ind. 2014), "an instruction which tracks verbatim the language of a statute is presumptively correct[,] . . . but "it is not also the case that an instruction is an incorrect statement of the law merely because it includes language not contained in the statute." The "purpose of a jury instruction is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Id.* (internal quotations omitted).

[22] Bwalya complains that the pattern would more aptly have informed the jury that "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 or acts or words, from which an inference of a common design or purpose may be reasonably drawn." Appellant's Br. pp. 15-16. However, the court's instruction, which we have duplicated above, provided the jury with that same

information. *See* Appellant's App. Vol. II, pp. 58-59, 69-70. The court did not abuse its discretion in this way.

[23] As a final matter, even if we were to conclude that the court abused its discretion by denying Bwalya's request to use the pattern jury instruction, such error is harmless. "An instruction error will result in reversal when the reviewing court cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the instruction not been given." *Dill v. State*, 741 N.E.2d 1230, 1233 (Ind. 2001) (internal quotations omitted). As we explain more fully below, any instruction deficiency did not prejudice Bwalya's substantial rights because his conviction was sustained by sufficient evidence from which a jury could not have properly found otherwise. There is no instructional error.

III. Sufficiency of the Evidence

[24] Bwalya challenges the sufficiency of the evidence to convict him, arguing that he did not "have the specific intent [to] aid others to kill Diaz[,]" and that he was not charged with felony murder. Appellant's Br. p. 17. He says that there "is no evidence that there was any preconceived plan that Bwalya was a part of to kill Diaz." *Id.* "For a sufficiency of the evidence claim, we look only at the probative evidence and reasonable inferences supporting the verdict." *Love v. State*, 73 N.E.3d 693, 696 (Ind. 2017). "We do not assess the credibility of witnesses or reweigh the evidence." *Id.* "We will affirm the conviction unless

no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.*

[25] The State's accomplice liability theory required it to prove that Bwalya knowingly or intentionally aided, induced, or caused Jerry, Donnie, or James to commit the offense of murder. *See* Ind. Code §35-42-1-1(1); Appellant's App. Vol. II, p. 71. The responsibility of a principal and an accomplice is the same. *Taylor v. State*, 840 N.E.2d 324, 338 (Ind. 2006).

[26] The following four factors guide our assessment of whether a person aided another in the commission of a crime: (1) presence at the scene of the crime; (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime; and (4) a defendant's conduct before, during, and after the occurrence of the crime. *Garland v. State*, 788 N.E.2d 425 (Ind. 2003). We conclude that all four factors are present here.

[27] There is no dispute that Bwalya was present at the scene of the crime, and the evidence clearly demonstrates that the group's plan began with Bwalya's text to the others, instructing them to meet him and to bring their guns so they could carry out three planned hits, the second of which was the hit resulting in Diaz's murder. Bwalya admitted that he knew Diaz carried a weapon, and he had observed Donnie put a gun to an unknown woman's head during the Michigan hit.

[28] As for the third factor, there is no evidence to support an inference that Bwalya made any effort to oppose the murder. Though he had no weapon, Bwalya

instructed the others to bring theirs to carry out the series of hits. This amplified the possibility that deadly force would be used. And the fourth factor is satisfied here as well. Bwalya told officers that he was the "thinker" of the group and that he came up with three definite hits with others that would be optional. Bwalya 1 at 1:13:09. He texted the others and told them to bring guns. Further, he told officers that though he did not carry a weapon, he always had someone standing to either his right or left who was armed. *Id.* He identified Diaz as a target, set up the deal, and assisted in commingling the buy money. Instead of rendering aid after Diaz was shot, Bwalya took the car and fled. The group cleaned out the car and disposed of most of the spent shell casings before continuing on their journey.

[29] Not only is the evidence sufficient to support Bwalya's conviction under accomplice liability, but the evidence is also sufficient to prove beyond a reasonable doubt that Jerry, Donnie, or James knowingly or intentionally killed Diaz. Bwalya told an officer that Jerry, Donnie, and James each raised their firearms and shot directly at Diaz. Donnie hit Diaz in his "center mass", and Diaz died as a result of his injuries. Bwalya 1 at 33:35-33-50; Tr. Vol. II, p. 129.

[30] "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) (1977). And a "person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code §35-41-2-2(b) (1977). Further, the "intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death." *Coleman v. State* 694 N.E.2d

269, 279 (Ind. 1998). It is reasonable for the jury to have concluded that Jerry, Donnie, and James either had the conscious objective to kill Diaz when they shot him or that they were aware of a high probability that shooting Diaz in the abdomen would result in his death. *See Lytle v. State*, 709 N.E.2d 1, 3 (Ind. 1999) ("To kill knowingly is to engage in conduct with an awareness that the conduct had a high probability of resulting in death."). The evidence is sufficient.

Conclusion

[31] In light of the foregoing, we affirm the trial court's judgment.

[32] Affirmed.

Riley, J., and Tavitas, J., concur.