



Appellant-defendant James D. Bailey, Jr. appeals his conviction for Murder in Perpetration of a Robbery,<sup>1</sup> a felony. Specifically, Bailey argues that the trial court abused its discretion by not instructing the jury on a lesser-included offense and by admitting hearsay testimony. Additionally, Bailey maintains that the prosecutor engaged in misconduct by asking the jury to convict on a basis other than the evidence. Finding that the trial court did not abuse its discretion and no other reversible error, we affirm.

### FACTS

Sometime during the morning of June 14, 2009, Bailey and Elliot Montgomery met with Stephen Haines and Monte Ingram to discuss a robbery that they intended to commit that afternoon. Montgomery and Bailey arrived in Montgomery's vehicle but left to trade it for a different vehicle to use in the robbery. Later, Montgomery and Bailey, arriving together in a van, met Haines and Ingram, parked the van near a school, and entered Haines's vehicle. Montgomery had a gun hanging from a string around his neck, which he left on the floor of the vehicle during the robbery. The four men rode together as they smoked marijuana and planned the robbery of a gas station in Gary.

The four men agreed that when they entered the store, Montgomery would pretend to purchase a cigar, while Ingram and Haines would pretend to shop near the front of the store. Meanwhile, Bailey would walk around the store to position himself to kick in the locked door that separated the cashier's office from the public area. Once Bailey, Montgomery, and Haines were inside the cashier's office, Ingram was to remain at the

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<sup>1</sup> Ind. Code § 35-42-1-1(2).

store's entrance as a lookout and to hold the door open in the event that the cashier had the ability to automatically lock the doors. The men also agreed that no one should be shot during the robbery, but Montgomery stated that if it became necessary to shoot someone, that person should be shot in the leg.

When the men arrived at the gas station, they parked near the entrance. They entered the store and took their planned position. Bailey walked to the rear of the store to the last aisle and toward the cashier's office door. When he was a short distance from the door, he began to run towards it and kicked the door open. Immediately thereafter, the three others moved. More particularly, Montgomery turned and ran towards the door and followed Bailey into the office. Haines pulled a gun from his pants and ran to the cashier's window. Once there, Haines paused briefly, pointed the gun at the window, and then turned, and ran into the office. Ingram took his position at the front door.

When Bailey entered the office, he clasped his hands together and pointed his fingers as though he were holding a gun and ran towards the cashier, Gurjeet Singh. Bailey attempted to punch Singh, but as he did, Singh kicked him and pushed him back into the outer area of the office. Haines entered the office and raised his gun as Bailey stumbled past him into the outer office. Upon seeing the gun, Singh raised his hands to his head, turned and moved to the rear of the office. Haines fired two shots, one of which struck Singh in the back and exited out his neck. The bullet perforated blood vessels low on his jugular and carotid artery and perforated his larynx, causing him to ultimately bleed to death from his injuries.

Bailey returned to the inner office and attempted to open the register to the lottery machine while Montgomery attempted to open the drawer to the cash register. Failing to open the lottery machine, Bailey ran past Singh to the corner of the office where a surveillance monitor and VCR were located. Bailey attempted to remove the tape from the VCR, but when this proved unsuccessful, he ripped the entire VCR away from the monitor. Montgomery was also unsuccessful in his attempt to open the cash register, so he looked around the office and took several cartons of cigarettes before fleeing.

Throughout these activities, Singh remained on the floor. When Singh made an unsuccessful gesture to raise himself, Haines raised and pointed the gun at him but lowered it when Singh fell back to the floor.

Bailey, Haines, and Montgomery fled the office in close succession and rejoined Ingram at the store's entrance before the four of them left in Haines's vehicle. They quickly drove to the van that Montgomery and Bailey had parked near a school. Bailey instructed the men to remove their shirts and place them in the seat of Haines's vehicle, which Bailey set on fire. The four men then fled in the van.

As Bailey was riding in the van, he worked to pry open the VCR to remove the tape and became very nervous. He stated that he wanted to get out of the van and walk home. Bailey kept the VCR tape and threw the VCR in a dumpster.

Shortly after the robbery, Deatra Brown went inside the gas station and saw a woman and a little boy "[j]ust standing there," and "leaning on the counter." Tr. p. 65. Brown asked the woman where the clerk was, and while looking over the counter, she

saw Singh lying on the floor and bleeding. When Brown inquired what had happened, the woman responded that she thought he had been shot. Brown walked over to Singh and told him that she was calling the police. Brown observed that Singh was still alive and moving a little, but he was unable to respond to her. Officer Simon Lillie of the Gary Police Department responded to the call. Brown stayed until the police arrived, but the other woman was neither identified by nor assisted the police.

The owner of the gas station had recently installed a digital surveillance system, and despite the theft of the VCR, the new system digitally recorded the crime from eight different cameras. Detective James Bond of the Gary Police Department reviewed portions of the video and identified Bailey from the video.

On July 23, 2009, the State charged Bailey with murder in the perpetration of robbery and murder, and his jury trial commenced on March 29, 2010. A compilation video of the footage from all of the cameras was shown to the jury, displaying the actions of the four men from several different angles throughout the entire crime.

Additionally, Ingram had pleaded guilty to class A felony robbery and agreed to testify at Bailey's trial. When describing the first discussion of the crime that morning, Ingram testified that Bailey and Montgomery had arrived and "[t]hey tell us about a robbery." Tr. p. 213-14. Bailey objected to the statement as hearsay, and the State responded that the statement was either one of a party-opponent or a co-conspirator. The trial court instructed the State to clarify to whom Ingram was referring to as "they." *Id.* at 214-15. Ingram testified that Montgomery first spoke, followed by Bailey, and that they

talked about committing a robbery. Ingram later testified that as he stood at the entrance during the robbery, he heard someone yell, “[s]hoot him, shoot, him.” Id. at 230. Although Ingram was not certain whether Bailey or Montgomery made the statement, he thought it was Montgomery. Bailey did not object to this statement or the remainder of Ingram’s testimony.

At the close of evidence, Bailey requested that, in addition to the charged offenses, the trial court instruct the jury on robbery, each as a class A, B, and C felony, and submitted proposed instructions. The trial court agreed to instruct the jury on the class A and B felonies but refused to provide the class C felony instruction. The trial court stated that “the jury heard information clearly indicating that a weapon was used in the commission of the offense. That is not in dispute.” Tr. p. 342.

During the State’s rebuttal closing argument, the prosecutor discussed the woman with the small boy, who had been captured on the surveillance video, but who never assisted the police. The prosecutor noted the brazenness of the crime being committed during the middle of the day and argued that the perpetrators relied upon the expectation that witnesses like the woman would not contact or assist the police. The prosecutor stated, “[t]his mentality is so pervasive in our society and it’s wrong. It’s wrong. People complain about why didn’t you do something about crime.” Tr. p. 376. Bailey made a general objection, and the trial court sustained the objection because the argument went beyond the evidence. Bailey did not request that the statements be stricken from the record or ask the trial court to admonish the jury or request a mistrial.

On April 1, 2010, the jury found Bailey guilty as charged, but the trial court entered a judgment of conviction only for murder in the perpetration of a robbery. On April 29, 2010, the trial court held a sentencing hearing and sentenced Bailey to sixty years in the Department of Correction. Bailey now appeals.

## DISCUSSION AND DECISION

### I. Instruction on Lesser-Included Offense

As stated above, Bailey requested that the trial court instruct the jury on robbery as a class A, B, and C felony. The trial court agreed to instruct the jury on robbery, each as a class A and B felony but declined to instruct on a class C felony. Bailey argues that this was error.

It is well established that the manner of instructing the jury is left to the sound discretion of the trial court. Aguilar v. State, 811 N.E.2d 476, 478 (Ind. Ct. App. 2004). A trial court's decision to refuse a tendered instruction will be reversed only for an abuse of that discretion. Id.

When a trial court is asked to instruct a jury on a lesser-included offense, it must first determine if the lesser offense is either inherently or factually included in the charged crime. Evans v. State, 727 N.E.2d 1072, 1080-81 (Ind. 2000). If it is, then the trial court must determine whether there is a "serious evidentiary dispute" as to the element that distinguishes the two crimes. Id. at 1081. When a trial court concludes that there is no serious evidentiary dispute as to the element in question, this Court treats that

finding with deference and reviews it only for an abuse of discretion. McEwen v. State, 695 N.E.2d 79, 84 (Ind. 1998).

In the instant case, Bailey was charged with murder in the perpetration of a robbery. Consequently, no one disputes that robbery is included in the charged crime.

Moving forward to what distinguishes the felony classes of robbery, class C felony robbery is the knowing or intentional taking of property from another through the use of or threat of force or by putting any person in fear. Ind. Code § 35-42-5-1. If it is committed while armed with a deadly weapon, it is a class B felony, and if it results in serious bodily injury to anyone other than the defendant, it is a class A felony. Id.

Here, the trial court refused to instruct the jury on class C felony robbery, stating that “the jury heard information clearly indicating that a weapon was used in the commission of the offense. That is not in dispute.” Tr. p. 342. Inasmuch as Singh bled to death as the result of gunshot wounds inflicted during the robbery, we agree that there was no serious evidentiary dispute whether a deadly weapon was used during the commission of the robbery.

Furthermore, it is of no consequence that Bailey himself was not armed with a deadly weapon or inflicted Singh’s gunshot wounds because under accomplice liability, a person who knowingly or intentionally aids, induces, or causes another person to commit a crime is equally guilty of both the crime intended and “the acts done by his confederates which were the probable and natural consequences of their common plan.” Parks v. State, 455 N.E.2d 904, 904-05 (Ind. 1983). And, the responsibility for any

bodily injury during the commission of a robbery rests with the perpetrators of the offense regardless of who inflicts the injury. Id. Accordingly, the trial court did not abuse its discretion by refusing to instruct the jury on class C felony robbery.

## II. Hearsay

Bailey argues that the trial court erred by admitting Ingram's testimony concerning a statement made by another accomplice, contending that it was hearsay. More particularly, Bailey argues that it was "extremely prejudicial" to him that "Ingram was permitted to testify that someone said, 'shoot him, shoot him' in reference to the clerk without identifying who said that." Appellant's Br. p. 11 (quoting tr. p. 230). Bailey acknowledges that he failed to object to this statement, but contends that its admission amounted to fundamental error.

The failure to make a contemporaneous objection at trial waives any claim on appeal that the evidence was improperly admitted. Brown v. State, 783 N.E.2d 1121, 1125-26 (Ind. 2003). Nevertheless, waiver can be avoided if the defendant can show that the admission of the evidence was fundamental error. Clay v. State, 766 N.E.2d 33, 36 (Ind. Ct. App. 2002). Fundamental error is error that constitutes such a blatant violation of basic principles of due process that it made a fair trial impossible. Boesch v. State, 778 N.E.2d 1276, 1279 (Ind. 2002).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Indiana

Evidence Rule 801(c). Hearsay that does not fall within an exception is inadmissible. Houser v. State, 661 N.E.2d 1213, 1219 (Ind. Ct. App. 1996).

Indiana Evidence Rule 801(d) excludes certain statements from the definition of hearsay. Specifically, Rule 801(d) excludes statements made by a party-opponent and those made by co-conspirators. Before a statement will satisfy the co-conspirator exclusion, the State must demonstrate that (1) a conspiracy existed between the declarant and the party against whom the statement is offered and (2) the statement was made during the course of and in furtherance of the conspiracy. Cockrell v. State, 743 N.E.2d 799, 804 (Ind. 2001).

In this case, Ingram testified that either Bailey or Montgomery made the statement. Tr. p. 230, 265-66, 280-81. If Bailey made the statement, it was excluded from the definition of hearsay as a statement of a party-opponent.

Similarly, if Montgomery made the statement, it would have been admissible under the co-conspirator exclusion, inasmuch as prior to Ingram's testimony, substantial evidence of a conspiracy between the four men had been presented in the surveillance video of the crime itself. And Bailey does not dispute that the video shows all four men arriving together, working in a coordinated fashion, interacting during the commission of the crime, and exiting together. State's Ex. 25. Moreover, prior to testifying to the statement, Ingram testified in detail regarding how the four men planned the crime together. Tr. p. 213-30. Consequently, there was no error in the admission of the statement.

### III. Prosecutorial Misconduct

Bailey argues that the prosecutor engaged in misconduct during closing argument by urging the jury to convict for reasons other than the evidence presented at trial. Although Bailey successfully objected to the statements, he concedes that he failed to request that the statements be stricken and the jury be admonished or request a mistrial. As Bailey acknowledges, he therefore must show that the prosecutor's statements rose to the level of fundamental error to avoid waiver. See Etienne v. State, 716 N.E.2d 457, 461 (Ind. 1999) (stating that when alleging prosecutorial misconduct, the defendant must not only object, but also request an appropriate remedy).

Fundamental error is an extremely narrow exception to the general rule that the failure to properly preserve a claim results in waiver. Sobolewski v. State, 889 N.E.2d 849, 856 (Ind. Ct. App. 2008). Under the fundamental error standard, this Court will not reverse an instance of prosecutorial misconduct unless we are convinced that the error made a fair trial impossible or constituted a blatant violation of basic and elementary principles of due process. Id.

Here, during closing argument, the prosecutor noted a woman in the surveillance video who failed to assist police, stating:

The woman that's walking out the door, she gets a look at all four of them as they come in. [Ingram's] holding the door for her. Doesn't help the police. Doesn't call the police. She's in the store when James Bailey kicks the door open. Didn't call the police. This mentality is so pervasive in our society and it's wrong. It's wrong. People complain about why didn't you do something about crime.

Tr. p. 376. The trial court sustained Bailey's objection to the last statement, concluding that it went beyond the evidence.

During Bailey's trial, the State presented more than sufficient evidence from which a jury could reasonably find him guilty. As previously stated, the entire crime was recorded on digital surveillance, which the jury viewed. State's Ex. 25. In addition to the video, Ingram's testimony explained to the jury Bailey's role in instigating and planning the crime and in attempting to conceal it afterwards. Tr. p. 213-16, 220-21, 227, 232-36, 238-42. In light of these facts and circumstances, we cannot say that the prosecutor's statements rose to the level of fundamental error, and we affirm the decision of the trial court.

The judgment of the trial court is affirmed.

MAY, J., and BRADFORD, J., concur.