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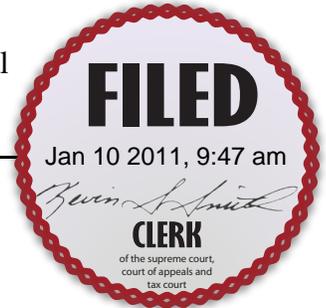
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**IN THE  
COURT OF APPEALS OF INDIANA**

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MRTYRONE DEMON METCALF, )  
)  
Appellant-Defendant, )  
)  
vs. )  
)  
STATE OF INDIANA, )  
)  
Appellee-Plaintiff. )

No. 45A04-1002-CR-69

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Thomas P. Stefaniak, Jr., Judge  
Cause No. 45G04-0810-MR-9

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**January 10, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Following a jury trial, Mrtyrone Demon Metcalf was convicted of murder,<sup>1</sup> murder in the perpetration of a robbery,<sup>2</sup> a felony, and robbery<sup>3</sup> as a Class B felony. Metcalf appeals and raises two issues that we restate as:

- I. Whether the trial court committed fundamental error during Metcalf's trial when, after taking judicial notice of the fact that another person involved in the robbery and murder had pleaded guilty to murder in the perpetration of a robbery, it instructed the jury "to accept as the truth" that the other person had pleaded guilty to the offense; and
- II. Whether the State presented sufficient evidence to convict Metcalf of murder and robbery.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

The facts most favorable to the verdict are that, on the afternoon of November 16, 2007, a group of men, including Metcalf, gathered at the home of Khalid Jackson-Bey ("Khalid") in East Chicago. Metcalf met in Khalid's kitchen with: Khalid, Khalid's brother, Haneef Jackson-Bey ("Haneef"), and Anthony Rias, Jr. ("Rias"). Not in the kitchen, but still able to hear portions of the kitchen conversation were: Edgar Covington ("Covington"), Jamal Hillsman ("Hillsman"), and Jermaine Hammonds ("Hammonds"). Hillsman saw Khalid with a gun and heard Rias ask the other men in the kitchen "if they wanted to go and

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

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

<sup>3</sup> See Ind. Code 35-42-5-1.

hit a lick<sup>4</sup> at Dominique's<sup>5</sup> house." *Tr.* at 298. Covington heard the men in the kitchen discuss that they had to "scoop out<sup>6</sup> the house." *Id.* at 197, 222. Hammonds heard someone in the kitchen say something about "weed" and then, "[L]et's go." *Id.* at 261; *see also* 299.

After approximately thirty minutes, all of the men at the house, except Haneef, left Khalid's residence in Hillsman's truck. Shortly thereafter, they picked up another man named Jamil Pirant ("Pirant"). Metcalf asked Pirant if he had the "duce duce" or "nine." *Id.* at 201. As they drove through a neighborhood, Rias pointed out Dominique Keese's ("Keese") house. Thereafter, they drove to a White Castle restaurant, where Rias borrowed a white Ford Explorer from Shameka Henderson ("Henderson"), his girlfriend and co-worker. Rias, Metcalf, Pirant, and Khalid left the restaurant in the white Explorer, and Hillsman followed in his truck with passengers Hammonds and Covington. The two vehicles drove toward Keese's house. Hillsman stayed up the block, while the white Explorer proceeded down the alley toward Keese's house. Hammonds saw three men exit the white Explorer, and Covington heard one or more gunshots. Minutes later, Rias, now alone in the Explorer, drove up to Hillsman's waiting truck. The two vehicles followed each other, and Rias dropped off the white Explorer and entered Hillsman's truck. Rias made or received a cell phone call, and then Hillsman's blue truck drove down a nearby street and picked up

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<sup>4</sup> There was conflicting testimony about the meaning of the phrase "hit a lick," but that most favorable to the verdict is that it refers to obtaining something unlawfully, through theft or robbery. *See Tr.* at 299 ("A 'lick' is when somebody gets robbed."), 445 ("A 'lick' means getting something materialistically easy or cheap or stealing it."), 446 (lick means "going to steal something").

<sup>5</sup> Dominique Keese was the victim in this case.

Metcalf, Pirant, and Khalid.

Khalid was carrying a black bag, and Metcalf was carrying a red bag. Covington heard either Metcalf or Pirant say, “It is done.” *Id.* at 208. Metcalf said to Khalid, “You want to shoot him in the chest. We come here to kill him.” *Id.* at 209. Covington noted that Metcalf and Khalid had ski masks hanging out of their pockets, and he observed “little red stains” on Metcalf and Pirant. *Id.* at 216, 218.

They drove back to Khalid’s house and, once inside, Metcalf, Pirant, and Khalid took guns from under their shirts and placed them under a shirt in the closet. From the black bag, someone took out a Play Station 3 game system, and Metcalf began playing video games with some of the others. Haneef removed marijuana from the bag and divided it up at least five ways, with a portion going to Metcalf.

Meanwhile, at about 4:30 p.m. that afternoon, Keese’s girlfriend, Dionne Austin (“Austin”), who lived just a few houses away from Keese’s residence, went to Keese’s apartment and saw that the house, normally tidy, was ransacked with items strewn about. She discovered Keese lying on the kitchen floor with wounds in his stomach. She called 911, and an ambulance arrived and transported Keese to a hospital where he was pronounced dead. Keese had suffered multiple gunshot wounds. *Id.* at 377-85. Authorities determined that the shots were fired from at least two and up to seven .22-caliber firearms.

The State initially charged Metcalf with Count I, the murder of Keese, and Count II, murder in the perpetration of robbery. It later filed an amended information to also charge

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<sup>6</sup> The phrase “scoop out the house” means “take a look at the house” or “see what his house looked

Metcalf with Count III, robbery as a Class B felony.<sup>7</sup>

During Metcalf's November 2009 trial, a number of witnesses testified, including Henderson, who stated that on November 16, 2007, she was working at White Castle, when her boyfriend and co-employee, Rias, came to the restaurant during her shift and borrowed her vehicle, a white Ford Explorer, from about 2:45 p.m. to 4:30 or 5:00 p.m. Later that day, Rias came to work for a short while, but his father came and picked him up because "they were trying to say he killed somebody." *Id.* at 190.

Joe Anderson, a neighbor of both Keesee and Austin, testified that he observed a white vehicle circle past Keesee's house and through the alley a couple of times on the day of Keesee's murder. A few minutes later, he saw a burgundy car sitting in the alley for a few minutes. That burgundy car belonged to Andre Johnson ("Johnson"), a good friend of Keesee's, who went to see Keesee on the afternoon of November 16. Johnson testified that although Keesee was expecting him, the door was locked when Johnson arrived. Johnson also heard a voice, not belonging to Keesee, inside the residence. He also noticed a white SUV driving through the alley. *Id.* at 147. Johnson ran to Austin's house to look for Keesee, but finding that neither Keesee nor Austin were there, Johnson returned to Keesee's house. He heard gunshots, and when he reached the entrance to the house, he saw that a camera set up in the window was missing and DVDs were lying on the porch steps. Johnson then telephoned a friend, who arrived and the two of them went back to Austin's house. Johnson told her what he had heard and seen at Keesee's house; Austin ran to Keesee's apartment and

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like." *Tr.* at 222.

found him on his kitchen floor.

Metcalf's longtime-friend Curtis Marshall ("Marshall") also testified, stating that, on or near November 13, Metcalf told Marshall that he was going to "hit a lick." *Id.* at 428. Later in the month, Metcalf told Marshall that "the sh\*t didn't go right." *Id.* at 430-31. A couple days later, Metcalf asked Marshall about "getting rid of the .22s." *Id.* at 433. Marshall testified that he assumed Metcalf was talking about tire rims. *Id.* at 438.

When the State called Pirant to testify, he refused, which was contrary to the terms of his plea agreement. At the State's request, the trial court entered judgment of conviction on Pirant's plea agreement and took judicial notice of the fact that Pirant had pleaded guilty to murder in the perpetration of a robbery. The court advised the jury that they were to "accept that as the truth." *Id.* at 506.

The jury found Metcalf guilty as charged. The trial court merged Counts I and II, sentencing him to fifty-five years on Count I, murder, and a consecutive ten-year term on Count III, robbery. Metcalf now appeals.

## **DISCUSSION AND DECISION**

### **I. Judicial Notice of Pirant's Conviction**

In August 2009, Pirant entered into a plea agreement under which he agreed to plead guilty to murder in the perpetration of a robbery, and he agreed to cooperate as to his knowledge of or involvement in Metcalf's violation of Indiana law. However, when the State called Pirant to testify during Metcalf's trial, Pirant stated, "I have nothing to say." *Tr.*

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<sup>7</sup> The State filed, and the trial court granted, a motion to join the trial of Rias with Metcalf's trial.

at 452, 500. Outside the jury's presence, Pirant's attorney moved to withdraw his appearance and the plea agreement,<sup>8</sup> both of which the trial court denied. The State asked the trial court to enter judgment of conviction pursuant to the terms of Pirant's plea agreement. Initially, Metcalf's attorney did not pose any objection, but later objected. Ultimately, the trial court entered judgment of conviction against Pirant as to Count II, murder in the perpetration of a robbery. The State requested that the trial court take judicial notice that Pirant had pleaded guilty. *Id.* at 501. Metcalf's attorney objected to the stipulated factual basis of Pirant's plea agreement being offered into evidence. After some extended discussion between the court and counsel, the trial court did not enter the stipulated facts from Pirant's plea into evidence; however, the trial court, without objection, instructed the jury:

All right. Ladies and gentlemen, in cause 45G04-0905-MR-00004, this witness, Jamil Pirant, pled guilty to Murder in the perpetration of a Robbery, an A felony. You are to accept that as the truth.

*Id.* at 506. On appeal, Metcalf asserts that the trial court committed fundamental error by so instructing the jury.

To qualify as fundamental error, an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Munford v. State*, 923 N.E.2d 11, 13 (Ind. Ct. App. 2010). The error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process. *Id.* at 13-14. When the court of appeals considers a claim of fundamental error with respect to jury instructions, it looks to the jury instructions as a whole

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<sup>8</sup> The plea agreement was still "under advisement" by the trial court when Pirant was called to testify.

to determine if they were adequate. *Id.* at 14.

Metcalf's argument about the trial court's instruction stems from Indiana Evidence Rule 201, which provides that a trial court may take judicial notice of a fact not subject to reasonable dispute, whether requested by a party or not, and may do so at any stage of the proceeding. *See* Ind. Evid. Rule 201(a), (c), (f). Specifically, Metcalf claims that the trial court's instruction contradicted Indiana Evidence Rule 201(g), which provides that in a criminal case, the court shall instruct the jury "that it may, but is not required to, accept as conclusive any fact judicially noticed." *Appellant's Br.* at 9. Metcalf asserts that the trial court should have instructed the jury that it "may, but is not required to, accept" the judicially noticed fact that Pirant pleaded guilty to murder in the perpetration of a robbery. Specifically, he argues, "The trial court should have instructed the jury that they did not need to accept as conclusive the fact that Pirant had participated in the murder of Keesee during a robbery." *Id.* We reject Metcalf's claim of fundamental error.

First, contrary to Metcalf's claim, the trial court did not actually instruct the jury that they were to accept as conclusive "the fact that Pirant had participated in the murder of Keesee during a robbery." Rather, the trial court instructed the jury to take judicial notice of the fact that Pirant pleaded guilty to that offense. This is not a statement that Pirant did or did not "participate in the murder of Keesee during a robbery."

Second, Metcalf has not explained in any detail how he was denied due process by the court's instructive statement to the jury. He merely asserts that the trial court, by giving the instruction to the jury, "created the inference that Metcalf had participated as well."

*Appellant's Br.* at 9. Metcalf does not develop that argument or cite to legal authority to support his claim of a denial of due process. Thus, he has waived the issue by failing to make a cogent argument. *Bonner v. State*, 776 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), *trans. denied* (2003).

Third, we find that if any error occurred, it was harmless. An error is harmless if the probable impact of the evidence upon the jury is sufficiently minor so as not to affect a party's substantial rights. *Cox v. State*, 854 N.E.2d 1187, 1197 (Ind. Ct. App. 2006). In this case, a review of the record reveals that by the time the trial court instructed the jury to accept as truth Pirant's plea agreement, the jury was well aware of Pirant's involvement in the robbery and murder. Throughout the trial, various witnesses testified to what they heard Pirant say and do on the day in question. Metcalf's attorney, during his opening statement, discussed at some length Pirant's role on the day in question, and he referred to the fact that Pirant had entered into a plea agreement, which the court had not yet approved. He further stated that Pirant admitted to being "a shooter." *Tr.* at 50. We must agree with the State that "whether an actual conviction had been entered likely made little difference in the eyes of the jurors who already knew that Pirant had pled guilty." *Appellee's Br.* at 7. The probable impact of the trial court's judicial notice of the plea agreement was sufficiently minor and did not affect Metcalf's substantial rights. Any error in the trial court's instruction to the jury concerning the fact that Pirant pleaded guilty to murder in the perpetration of a robbery was harmless.

## **II. Sufficiency of the Evidence**

Urging “a paucity of evidence,” Metcalf argues that the State presented insufficient evidence to convict him of murder, murder in the perpetration of a robbery, or robbery.<sup>9</sup> *Appellant’s Br.* at 12. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. *Kenney v. State*, 908 N.E.2d 350, 351-52 (Ind. Ct. App. 2009), *trans. denied*. We do not assess witness credibility or reweigh the evidence. *Id.* We consider conflicting evidence most favorably to the trial court’s ruling. *Id.* We affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” *Id.* at 351-52. It is not necessary that the evidence overcome every reasonable hypothesis of innocence. *Id.* at 352. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.* It is well established that “circumstantial evidence will be deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt.” *Id.*

To convict Metcalf of murder, as charged, the State was required to prove that Metcalf knowingly or intentionally killed Keese. Ind. Code § 35-42-1-1(1). To convict him of murder in the perpetration of a robbery, as charged, the State was required to establish that Metcalf killed Keese while committing or attempting to commit robbery. Ind. Code § 35-42-1-1(2). To convict him of robbery, as a Class B felony, the State was required to prove that Metcalf knowingly or intentionally took property from Keese by using or threatening

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<sup>9</sup> Metcalf was convicted of three counts: Count I, murder, Count II, murder in the perpetration of a robbery, and Count III, robbery; however, the trial court merged Counts I and II.

the use of force while armed with a deadly weapon. Ind. Code § 35-42-5-1. Indiana's accomplice liability statute provides:

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.

Ind. Code § 35-41-2-4. Under accomplice liability, an individual who aids another person in committing a crime is as guilty as the actual perpetrator. *Specht v. State*, 838 N.E.2d 1081, 1093 (Ind. Ct. App. 2005), *trans. denied* (2006). The accomplice need not participate in each and every element of the crime to be convicted of it. *Id.* A defendant's presence at the scene of the crime may be considered along with the defendant's relation to the one engaged in the crime, and the defendant's actions, before, during, and after the commission of the crime. *Bruno v. State*, 774 N.E.2d 880, 882 (Ind. 2002); *McGee v. State*, 699 N.E.2d 264, 265 (Ind. 1998).

In urging us to find that the State failed to present sufficient evidence to convict him, Metcalf relies primarily on claims that there was a lack of direct evidence regarding the actual shooting or robbery. He also argues that some testimonial evidence was conflicting, and he notes that any evidence of motive was lacking. Consequently, he argues, we should reverse his convictions. We disagree.

The evidence most favorable to the verdict is that Metcalf spoke with his friend Marshall on November 13, 2007 and told Marshall that he was going to "hit a lick." *Tr.* at 428. A few days later, on November 16, Metcalf met with Rias, Khalid, and Haneef in

Khalid's kitchen, and one of those men said, "[W]e got to scoop out the house." *Id.* at 197. Rias asked the others if they wanted to "hit a lick" at Keesee's house. *Id.* at 298. The word "weed" was also mentioned. *Id.* at 261. After about twenty or thirty minutes, someone said, "[L]et's go," and everyone at Khalid's house (except Haneef) loaded into Hillsman's truck. *Id.* at 261-62. They picked up Pirant and drove past Keesee's residence. Metcalf asked Pirant if he had "a duce duce [sic]." *Id.* at 228. Rias borrowed the white Ford Explorer from his girlfriend, and Metcalf rode in the Explorer with Rias, Pirant, and Khalid to Keesee's house and parked in the back alley; Hillsman followed in his truck but waited up the street. A gunshot was heard and, shortly thereafter, Rias, now alone, drove the Explorer up to Hillsman's truck; Hillsman followed him, and Rias dropped off the Explorer and got into Hillsman's truck. The men drove down another street and picked up Metcalf, Khalid, and Pirant. Metcalf and Khalid each carried a duffel bag, and each had a ski mask hanging out of his pocket. Metcalf or Pirant said, "It is done." *Id.* at 208. Metcalf said "[Y]ou want to shoot him in the chest. We come here to kill him." *Id.* at 209. Metcalf also made a statement that he "had shot him in the body." *Id.* at 307. Metcalf and Pirant had small red stains on their clothing. The group of men, including Metcalf, returned to Khalid's house and divided up marijuana, with a portion going to Metcalf. Metcalf, Pirant, and Khalid each removed a gun from under his shirt and placed it in the closet. Some of the men, including Metcalf, played the Play Station 3 video gaming system, which had been removed from one of the duffel bags.

Meanwhile, when Keesee's friend Johnson came to visit Keesee around 3:00 or 4:00

p.m., Keesee did not answer the door, and Johnson heard one or more voices inside that did not belong to Keesee. He saw a white SUV in the alley. After making a quick run to Austin's house and back, Johnson heard gunshots. When he reached the entrance to Keesee's residence (located at the rear of the house), he saw DVDs on the porch steps and noticed the video camera in the window was missing. Austin's neighbor, Anderson, was home watching TV on the afternoon of November 16, and he saw a white SUV circle the area two or three times. When Austin returned home from shopping around 4:30 p.m., she went to Keesee's home and found his house in disarray and Keesee on the floor, having suffered multiple gunshot wounds. At the scene, police noted an empty Play Station box and observed that the safe at Keesee's house was open and empty. Forensic experts determined that Keesee was shot at least thirteen times, by at least two, and up to seven, .22-caliber firearms. Later in November, Metcalf told Marshall that "the sh\*t didn't go right." *Id.* at 430. Metcalf also asked Marshall to "[g]et rid of the .22s." *Id.* at 433.

We conclude that the evidence and inferences drawn therefrom were sufficient for the jury to find Metcalf guilty of murder, murder in the perpetration of a robbery, and robbery.

Affirmed.

BAILEY, J., concurs.

RILEY, J., dissents with separate opinion.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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MRTYRONE DEMON METCALF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A04-1002-CR-69
	)	
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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**RILEY, Judge, dissenting with separate opinion.**

Although I agree with the majority’s decision with respect to Metcalf’s sufficiency claim, I respectfully dissent from the majority’s opinion regarding Metcalf’s jury instruction argument. When Pirant refused to testify against Metcalf pursuant to the terms of his plea agreement, the trial court entered a “judgment of conviction” against Pirant as to murder in the perpetration of a robbery. (Tr. p. 475). However, it should be pointed out that this judgment did not conform to the dictates of Ind. Code § 35-38-3-2 as it failed to specify the sentence and amount of credit, if any, and therefore cannot be considered a final, “valid written judgment.” *McElroy v. State*, 865 N.E.2d 584, 588-89 (Ind. 2007). As such, I believe the trial court erred when it appeared to inform the jury that Pirant’s guilty plea was set in stone.

Regardless, even if the jury was properly advised that Pirant's guilty plea could be accepted "as the truth," the trial court erred by failing to instruct the jury it "may, but is not required to, accept" the judicially noticed fact that Pirant pled guilty. *See* Ind. Evid. Rule 201(g). During the hearing, the State clearly and in the presence of the jury stated that

[Pirant], as part of the plea agreement of guilty to [m]urder in the [p]erpetration of robbery, you sworn under oath that you, [Metcalf], and Khalid Jackson-Bey acted together to commit the murder and robbery of [keesee], didn't you?

(Tr. p. 500). By representing the plea agreement as a true fact without advising the jury of their province to determine the weight to attribute to this fact, the trial court in effect created a very strong inference that Metcalf had participated in the murder while at the same time the court lowered the State's burden of proof.

In sum, I conclude that either of these errors—and definitely both errors taken together—amounted to a denial of Metcalf's due process rights and impeded his right to a fair trial.