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ATTORNEY FOR APPELLANT:

CHARLES W. LAHEY
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ABDULLAH ALKHALIDI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0810-CR-481
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jane Woodward Miller, Judge
Cause No. 71D03-9905-CF-286

August 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Abdullah Alkhalidi appeals his convictions for theft as a class D felony,[1] robbery as a class B felony,[2] and murder.[3] Alkhalidi raises four issues, which we revise and restate as:

I. Whether the trial court violated Alkhalidi's right to counsel of his choice by denying his motion for continuance;

II. Whether the trial court abused its discretion when it admitted the testimony of various witnesses;

III. Whether there was sufficient evidence of jurisdiction and venue; and

IV. Whether the trial court erred because its instructions and response to the jury's questions did not state that Alkhalidi could not be guilty of murder merely because he assisted another person in hiding the victim's body.

We affirm.

The relevant facts follow. On May 2, 1999, Claude Purdiman ("Purdiman") and his brother, Terrance Purdiman ("Terrance"), were at the home of their father. Purdiman showed Terrance and his father $3,000 and said that he was going to the Blue Chip Casino in Michigan City, Indiana. Purdiman and Terrance left their father's house at the same time in separate cars. Terrance went to Benton Harbor and Purdiman turned off the highway to go to the casino. A surveillance tape from the Blue Chip Casino showed

[1] Ind. Code § 35-43-4-2 (1998).

[2] Ind. Code § 35-42-5-1 (1998).

[3] Ind. Code § 35-42-1-1 (Supp. 1997) (subsequently amended by Pub. L. No. 17-2001, § 15 (eff. July 1, 2001); Pub. L. No. 151-2006, § 16 (eff. July 1, 2006); Pub. L. No. 173-2006, § 51 (eff. July 1, 2006); Pub. L. No. 1-2007, § 230 (eff. Mar. 30, 2007)).

Alkhalidi and Purdiman leaving the casino at the same time around 2:37 in the morning on May 3, 1999.

On May 3, 1999, around 12:30 or 1:00 p.m., Purdiman spoke with Kimberly Holmes and Marjorie Scott in South Bend, Indiana. Purdiman said that he was going over to Alkhalidi's house because they were going back to the gambling boat.

On May 4, 1999, a neighbor saw Alkhalidi washing and shampooing the inside of his car and scrubbing the mats of his car. That same day, Alkhalidi went to the Blue Chip Casino and "bought in" for $1,600, which was unusual for him because his typical "buy in" was fifty to one hundred dollars. Transcript at 956-957.

After being unable to reach Purdiman, Terrance and Chantae Taylor, Purdiman's girlfriend, filed a report with the Elkhart Police on May 6, 1999. Taylor and Terrance went through some of Purdiman's personal effects at Taylor's house and found a piece of paper with Alkhalidi's phone number on it.

On May 8, 1999, a call was placed from Purdiman's cell phone at 11:01 p.m. to Dawn Schooley, a woman that Alkhalidi had a child with in 1997. That same day, the Berrien County Sheriff's Department in Michigan received a call that a body was found in the woods. The body was partially burned. The police identified the body as Purdiman. Purdiman died due to a gunshot wound to the head, which was caused by a .44 caliber or .45 caliber bullet. Purdiman's vehicle was discovered in Michigan, and it did not have a license plate.

The police spoke to a casino employee who identified the man on the video as Alkhalidi, and the police obtained Alkhalidi's address from his gaming card. The Berrien County Sheriff's Department contacted the Indiana authorities after obtaining Alkhalidi's name.

On May 13, 1999, Detective Dave Roseneau of the Berrien County Sheriff's Department and members of the State Police observed Alkhalidi's residence in South Bend, Indiana. Alkhalidi drove up to his residence and exited his vehicle. While detectives spoke with Alkhalidi, Detective Roseneau saw Purdiman's license plate sitting in the trunk of Alkhalidi's vehicle, which was open and did not have a trunk liner.

The detectives asked Alkhalidi about the license plate. Alkhalidi became "very, very nervous" and then became "very argumentative." Transcript at 674. The detectives asked to see Alkhalidi's driver's license. Alkhalidi bent into his vehicle and got a planner out and "was acting like he was going to show" the officers his driver's license. Id. at 541. Alkhalidi then began patting around on the seat until Detective Roseneau said, "That's enough. Get out of there." Id. Alkhalidi attempted to grab the license plate out of the car. Alkhalidi came out of the car, shoved Detective Roseneau to the ground, and ran. The detectives chased after Alkhalidi until a bystander tackled Alkhalidi.

After obtaining a search warrant for Alkhalidi's house and vehicle, the police discovered the trunk liner in a trash can. The police recovered a bottle of ammonia and Purdiman's license plate from the trunk of Alkhalidi's vehicle. The police also discovered a Ruger nine-millimeter handgun, a .45 caliber cartridge, a .45 caliber spent

case, a bullet, and Purdiman's driver's license in Alkhalidi's vehicle. The police discovered ammonia, wash cloths or towels, a shirt, an empty "Blue Chip matchbook," and a partially burnt piece of paper that had the word "Blue" on it in a trash can. Id. at 840. The police also discovered an item from the Blue Chip Casino with Purdiman's name on it. Purdiman's blood was detected on the floor mat, the towel, the paper towels, a t-shirt, the trunk mat, and the floor carpeting from the passenger seat. Alkhalidi's fingerprint was discovered on the cartridge holder.

In May 1999, the State charged Alkhalidi with Count I, murder; Count II, receiving stolen property as a class D felony; Count III, receiving stolen property as a class D felony; and Count IV, receiving stolen property as a class D felony. In November 1999, the State filed an amended information that charged Alkhalidi with Count I, murder; Count II, theft as a class D felony; Count III, felony murder; Count IV, attempted robbery as a class A felony; and Count V, robbery as a class A felony.

After a jury trial in 2000, Alkhalidi was convicted of murder, robbery, and theft. Alkhalidi v. State, 753 N.E.2d 625, 627 (Ind. 2001) ("Alkhalidi I"). The trial court sentenced Alkhalidi to a total sentence of sixty-five years. Id.

Alkhalidi filed a direct appeal and argued that there was insufficient evidence to establish either jurisdiction in Indiana or venue in St. Joseph County, that there was insufficient evidence to convict him of robbery, and that his ability to provide an effective alibi defense was impeded. Id. at 627-630. The Indiana Supreme Court affirmed Alkhalidi's convictions. Id. at 630.

In 2002, Alkhalidi filed a petition for post-conviction relief. The trial court granted Alkhalidi's petition for post-conviction relief and ordered a new trial.[4]

On June 12, 2007, the trial court granted the motion to withdraw filed by Alkhalidi's public defender and appointed a new public defender to represent him. On June 21, 2007, Philip Skodinski appeared as Alkhalidi's public defender. Alkhalidi requested a speedy trial and the trial court set the trial for August 27, 2007. On August 14, 2007, the trial court granted Alkhalidi's oral motion to continue the trial and reset the trial for December 3, 2007. On October 1, 2007, Alkhalidi filed a pro se verified motion for change of counsel. After a hearing, the trial court denied Alkhalidi's motion for change of counsel. On November 14, 2007, the trial court rescheduled the trial for February 25, 2008. On November 30, 2007, Alkhalidi filed a motion to reset the trial date, and the trial court reset the trial for April 14, 2008.

On April 1, 2008, Clark Holesinger entered his appearance on behalf of Alkhalidi contingent upon the continuance of the trial. After a hearing, the trial court allowed Holesinger to serve as private backup counsel to Alkhalidi's public defender and denied Alkhalidi's motion to continue the trial.[5]

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[4] The record does not reveal why Alkhalidi's petition for post-conviction relief was granted. Alkhalidi's brief states, "Although the record is largely silent concerning this, it appears that the Petition for Post Conviction Relief was granted, the State failed to timely file an appeal of this ruling and the Court then denied the State's Petition for Permission to File a Belated Appeal." Appellant's Brief at 2. The State agreed with Alkhalidi's statement of the case.

[5] Alkhalidi states that "[a]lthough the trial court indicated it had no objection to Attorney Holesinger acting as private back-up counsel to Alkhalidi's court appointed attorney . . . it denied Holesinger's Motion for Continuance of Trial and Holesinger thereafter did not participate in any further proceedings." Appellant's Brief at 19.

On April 11, 2008, the State filed a motion to dismiss Count IV, attempted robbery as a class A felony, which the trial court granted. That same day, the State filed an amended information for Count III and Count IV. Specifically, with respect to Count III, felony murder, the State added the phrase "committing or" in the following sentence: "On or about the 3rd day of May[ ]1999, in St. Joseph County, State of Indiana, [Alkhalidi] did kill Claude Purdiman, Jr. while *committing or* attempting to commit Robbery . . . ." Appellant's Appendix at 106. Count IV was amended to robbery as a class A felony. The trial court granted the State's motion to amend the information.

At the jury trial, Kimberly Holmes testified that she saw Purdiman on May 3, 1999 around 12:30 or 1:00 p.m. Holmes testified that Purdiman said that he was going over to Alkhalidi's house because they were going back to the gambling boat. Marjorie Scott testified that she also saw Purdiman at that time and that Purdiman said that he was going to pick up two men and visit the gambling boat. Purdiman's father testified that Purdiman stated that he was going to meet someone at the gambling boat on May 2, 1999. Alkhalidi did not object to any of this testimony.

At trial, Alkhalidi testified that he left his home in South Bend with Sahap Alshamari and Purdiman for Detroit, Michigan. Alkhalidi testified that Purdiman left his car in the parking lot of a shopping center on the way to Detroit and the three men went together in Alkhalidi's car. Alkhalidi also testified that after picking up another vehicle in Detroit, Alkhalidi drove one vehicle, while Alshamari drove Alkhalidi's vehicle in which Purdiman rode as a passenger. Alkhalidi testified that he saw Alshamari shoot

Purdiman. During closing argument, Alkhalidi's counsel argued that Alkhalidi was not guilty of murder because he assisted only after the murder.

At trial, Alkhalidi proposed the following instruction:

> The Court further instructs you that a oerson [sic] who with the intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the person subsequent to the commission of the offense is not criminally responsible for that offense.
>
> I.C. 35-44-3-2
> Salinas v. State 858 NE2nd 1073 (Ind. App 2006)

Id. at 185. Alkhalidi's counsel argued that the instruction was necessary "to clarify that an accomplice, that assisting somebody after the fact, is not the same as being an accessory to the crime." Transcript at 1415. The trial court suggested modification of the State's instruction on accomplice liability. After some discussion, Alkhalidi's counsel withdrew his request to modify the State's instruction and withdrew his proposed instruction.

During deliberations, the jury asked: "Is aiding the same as being an accessory to the crime? What does an accessory after the fact mean?" Id. at 1644. The jury also asked:

> [A]t what point is a crime over? In other words, in aiding and abetting, does that have to happen during the course of or after the crime? Helping to hide the body may have happened after the actual murder, but is that aiding during the crime or after the crime?

Id. After some discussion, the trial court proposed the following instruction:

> Factors you may consider to determine whether a person aided another in the commission of the crime include, one, presence at the scene of the

> crime. Two, companionship of another engaged in the crime. Three, failure to oppose the commission of the crime, and, four, the course of conduct before, during, and after the crime occurred. While the person's presence during the commission of a crime or his failure to oppose the crime as proved are by themselves insufficient to establish accomplice liability. You may consider them with other facts and circumstances tending to show participation. There must be evidence of affirmative conduct either in the form of acts or words from which an inference of common design or purpose to effect the commission of a crime may be reasonably drawn.

Id. at 1651. The following exchange then occurred:

> [Alkhalidi's Counsel]: Okay. I guess my only concern is the definition of aiding and inducing does not say anything about after. The statute only talks about committing the offense.
>
> THE COURT: Well, but and that's – This is the final sentence of this instruction said: There must be evidence of affirmative conduct, either in the form of acts or words from which an inference of common design or purpose to effect the commission of a crime may be reasonably drawn.
>
> [Alkhalidi's Counsel]: Okay. I do like that language.
>
> THE COURT: Huh?
>
> [Alkhalidi's Counsel]: I do like that language.

Id. at 1652-1653. The trial court then gave its proposed instruction to the jury.

The jury found Alkhalidi guilty as charged. The trial court merged Count I, murder, and Count III, felony murder. The trial court convicted Alkhalidi of Count I, murder, Count II, theft as a class D felony, and Count IV, robbery as a class B felony. The trial court sentenced Alkhalidi to fifty-five years for murder, ten years for robbery as a class B felony, and eighteen months for theft as a class D felony. The trial court ordered that the sentences for murder and robbery be served consecutively. The trial

court ordered that the sentence for theft run concurrently with the sentence for robbery. Thus, Alkhalidi received an aggregate sentence of sixty-five years in the Indiana Department of Correction.

I.

The first issue is whether the trial court violated Alkhalidi's right to counsel of choice by denying his motion for continuance. Alkhalidi argues that the trial court improperly denied his motion to continue the trial so that he could hire Holesinger as a private attorney. The State argues that Alkhalidi's motion for a continuance and change of counsel on April 1, 2008 when the trial was scheduled for April 14, 2008, constituted a last-minute request given the length of time the case had been pending. The State also points out that the prosecutor had issued between thirty-five and forty subpoenas in preparation for trial.

"The denial of a continuance is reviewed for an abuse of discretion." Lewis v. State, 730 N.E.2d 686, 690 (Ind. 2000). The denial of the right to counsel of choice is reviewed to determine whether the trial court acted unreasonably and arbitrarily. Id. "The Sixth Amendment guarantees a criminal defendant's right 'to have the assistance of counsel for his defense.'" Id. at 688. "A corollary of this right is the right to choose counsel when a defendant is financially able to do so." Id. at 688-689. "However, the right to counsel of choice is not absolute." Id. It is well settled that the right to counsel of choice must be exercised at the appropriate stage of the proceeding. Id. at 689.

Continuances sought shortly before trial to hire a new attorney are disfavored because they cause substantial loss of time for jurors, lawyers, and the court. Id.

Here, Alkhalidi requested a speedy trial and the trial court set the trial for August 27, 2007. On August 14, 2007, the trial court granted Alkhalidi's oral motion to continue the trial and reset the trial for December 3, 2007. After the trial court rescheduled the trial for February 25, 2008, Alkhalidi filed a motion to reset the trial date on November 30, 2007, and the trial court reset the trial for April 14, 2008.

On April 1, 2008, Clark Holesinger entered his appearance on behalf of Alkhalidi contingent upon the continuance of the trial. At the hearing, the following exchange occurred between Holesinger and the trial court:

> MR. HOLESINGER: . . . . The second has questions [sic] as to the Court's procedures with the trial, and I don't know if you want me to raise those now. You have a Public Defender. I have to go back to individuals that came up with funds and talk to them about what they want me to do. If I do enter to assist, is that going to affect his Public Defender status?
>
> THE COURT: You mean, do I revoke the Public Defender because you're coming in?
>
> MR. HOLESINGER: Yes. I mean there's no way I can get as familiar as counsel is with this case, at that point. But the family may still want me to be involved.

Transcript at 207. After a discussion between the parties, the trial court denied Alkhalidi's motion to continue and allowed Holesinger to serve as backup counsel. At the end of the hearing, Holesinger stated, "Your Honor, I have not officially entered. I have to talk to my client, and even though you're allowing me to go back and – I want

that clear, at this point in time." Id. at 212. Holesinger also stated, "I don't want the Court to be looking for me at 8:30, or whenever you start, on the day of the trial." Id. at 213.

In summary, the record reveals that almost nine years passed between the offense and the scheduled trial date of April 14, 2008. The trial court granted Alkhalidi's previous motions for continuance. While Alkhalidi had expressed dissatisfaction with his public defender, Alkhalidi did not indicate to the trial court that he intended to hire private counsel until Clark Holesinger entered his appearance on behalf of Alkhalidi contingent upon the continuance of the trial on April 1, 2008, thirteen days before the scheduled trial date of April 14, 2008. The trial court allowed Holesinger to serve as backup counsel. Under the circumstances, we cannot say that the trial court abused its discretion by denying Alkhalidi's motion for a continuance or acted unreasonably and arbitrarily regarding Alkhalidi's right to counsel. See Schmid v. State, 804 N.E.2d 174, 178 (Ind. Ct. App. 2004) (holding that the trial court properly exercised its discretion in denying the defendant's motion to continue and that the trial court did not impair the defendant's right to have counsel of her choosing and noting that the case had been pending for quite some time when private counsel entered his appearance on defendant's behalf and private counsel requested a continuance just over a month before the trial was scheduled to begin), trans. denied.

II.

The next issue is whether the trial court abused its discretion by admitting the testimony of Kimberly Holmes, Marjorie Scott, Purdiman's father, and Chantae Taylor regarding Purdiman's intentions. We review the trial court's ruling on the admission of evidence for an abuse of discretion. Noojin v. State, 730 N.E.2d 672, 676 (Ind. 2000). We reverse only where the decision is clearly against the logic and effect of the facts and circumstances. Joyner v. State, 678 N.E.2d 386, 390 (Ind. 1997), reh'g denied.

Alkhalidi argues that the statements were inadmissible because they constituted hearsay. Alkhalidi points to the testimony of Kimberly Holmes and Marjorie Scott in which they stated that Purdiman told them that he was going to the gambling boat. Alkhalidi also points to the testimony of Purdiman's father in which Purdiman's father testified that Purdiman "had a lot of money on him and that he was going to the Blue Chip Casino." Appellant's Brief at 16. Lastly, Alkhalidi points to the testimony of Chantae Taylor in which she testified that Purdiman told her that he was going to the casino and that Purdiman later called her and told her that he was outside of South Bend and tired.

Any claim of error has been waived because defense counsel did not object to the admission of the statements at trial. See Johnson v. State, 734 N.E.2d 530, 532 (Ind. 2000). "Failure to object at trial waives any claim of error and allows otherwise inadmissible hearsay evidence to be considered for substantive purposes and to establish a material fact at issue." Id. (quoting Allen v. State, 686 N.E.2d 760, 775 (Ind. 1997),

reh'g denied, cert. denied, 525 U.S. 1073, 119 S. Ct. 807 (1999)). Thus, Alkhalidi has waived this claim of error for appellate review. See id.; Gill v. State, 730 N.E.2d 709, 711 (Ind. 2000) ("Because Defendant did not object at trial to the admissibility of the evidence on the basis of character evidence, he has waived this claim of error for appellate review.").

III.

The next issue is whether there was sufficient evidence to establish jurisdiction or venue in St. Joseph County. Our standard for reviewing sufficiency of the evidence claims is well settled. Alkhalidi I, 753 N.E.2d at 627. We do not reweigh the evidence or judge the credibility of the witnesses, and it lies within the jury's exclusive province to weigh conflicting evidence. Id. We will affirm the trial court if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. Id.

A. Jurisdiction

Alkhalidi argues that Indiana did not have jurisdiction of his case because the State did not prove jurisdiction beyond a reasonable doubt. Jurisdiction is considered an element of the offense. Alkhalidi I, 753 N.E.2d at 627. Indiana has jurisdiction if either the conduct that is an element of the offense or the result that is an element occurs in Indiana. Id.; Ind. Code § 35-41-1-1(b)(1) (Supp. 2006).[6] Jurisdiction must be proved

[6] Ind. Code § 35-41-1-1(b)(1) provides that "[a] person may be convicted under Indiana law of an offense if . . . either the conduct that is an element of the offense, the result that is an element, or both, occur in Indiana . . . ."

beyond a reasonable doubt. Alkhalidi I, 753 N.E.2d at 627. "Where a defendant is charged with multiple crimes that are 'integrally related,' jurisdiction over all the crimes is proper if some of them occurred in Indiana." Id. at 628 (quoting Conrad v. State, 262 Ind. 446, 450-451, 317 N.E.2d 789, 791-792 (1974)). "Two states can each have concurrent criminal jurisdiction over a crime with the proper nexus to both." Id. at 627. "Whether Michigan could also have tried Alkhalidi is irrelevant." Id.

The Indiana Supreme Court addressed this issue in Alkhalidi's first appeal by holding:

> The jury was instructed that it had to find jurisdiction beyond a reasonable doubt. There was sufficient evidence for the jury to conclude that either the conduct--the robbery and/or shooting--or the result--the taking of property and/or death--occurred in Indiana. Purdiman was last seen in St. Joseph County, Indiana. He had announced his intention to go with Alkhalidi west to Michigan City, Indiana, not north to Michigan. He had a large amount of cash that might or might not have been in his possession after the contemplated casino visit. On May 3 or 4 Purdiman's car was seen outside Alkhalidi's home. No blood was found near Purdiman's body, suggesting that he was not killed where his body was found. The blood in Alkhalidi's car points to the car as the place where Purdiman was murdered. Many of Purdiman's personal effects (clothing, a cell phone, drivers license, and a dinner ticket) were found at Alkhalidi's residence. This evidence was sufficient for the jury to conclude beyond a reasonable doubt that Purdiman was killed in the course of a robbery that took place at least in part in Indiana. In addition, Alkhalidi was convicted of theft for "exerting unauthorized control" over Purdiman's license plate. This crime clearly occurred in Indiana because the police found Alkhalidi with the plate outside of his home in St. Joseph County.

Id. at 628 (footnote omitted). The Court concluded that Indiana had jurisdiction over the prosecution. Id.

Alkhalidi argues that "[t]he evidence in the second trial was not identical to the first trial." Appellant's Brief at 21. Alkhalidi argues that Stephen Cohle, a forensic pathologist, "testified that there was insufficient evidence from which he could conclude that Purdiman was or was not shot where his body was found" and "[h]e also could not determine whether the victim bled a small or large amount of blood because he could not tell how long the victim's heart continued to pump after he was shot." Id. at 22. Alkhalidi also appears to argue that the statements that Purdiman was going to the casino in Michigan City, Indiana, "were admissible for a limited purpose only if they were admissible at all." Id. at 22. We have already held that Alkhalidi waived the issue of the admissibility of these statements. See supra Part II.

Here, similar to the first trial, the record reveals that Purdiman was last seen in St. Joseph County, Indiana, and had announced his intention to go to Michigan City, Indiana. Purdiman's blood was detected on the floor mat, the towel, the paper towels, a t-shirt, the trunk mat, and the floor carpeting from the passenger seat of Alkhalidi's car. Purdiman's personal effects were found at Alkhalidi's residence. Further, Alkhalidi was convicted of theft of Purdiman's license plate and as the Indiana Supreme Court stated in Alkhalidi I, "[t]his crime clearly occurred in Indiana because the police found Alkhalidi with the plate outside of his home in St. Joseph County." Alkhalidi I, 753 N.E.2d at 628. Based upon the record, we conclude that evidence of probative value exists from which the jury could have found that jurisdiction existed in Indiana because either conduct (the robbery and/or shooting) or the result (the taking of property and/or death) occurred in Indiana.

B. Venue

Alkhalidi appears to argue that St. Joseph County did not have venue because "[t]here is no evidence in this record which even remotely suggests that Purdiman was murdered in St. Joseph County." "The right to be tried in the county in which an offense was committed is a constitutional and a statutory right." Alkhalidi I, 753 N.E.2d at 628 (citing Ind. Const. art. 1, § 13; Ind. Code § 35-32-2-1(a)). Venue is not an element of the offense. Id. Accordingly, although the State is required to prove venue, it may be established by a preponderance of the evidence and need not be proved beyond a reasonable doubt. Id.

Venue is usually an issue for determination by the jury. Id. This is because venue typically turns on an issue of fact, i.e., where certain acts occurred. Id. If so, it is appropriate for the court to instruct the jury on venue. Id. The jury in the second trial was instructed that it had to unanimously find that venue had been established in St. Joseph County. In Alkhalidi I, the Court held that "[t]he same facts pointing to jurisdiction in Indiana also suggest venue in St. Joseph County." Id. We agree and reach the same conclusion in this case.

IV.

The next issue is whether the trial court erred because its instructions and response to the jury's questions did not state that Alkhalidi could not be guilty of murder merely because he assisted another person in hiding Purdiman's body. Generally, "[t]he purpose of an 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." Overstreet v. State, 783 N.E.2d 1140, 1163 (Ind. 2003), cert. denied, 540 U.S. 1150, 124 S. Ct. 1145 (2004). Instruction of the jury is generally within the discretion of the trial court and is reviewed only for an abuse of that discretion. Id. at 1163-1164. A trial court erroneously refuses to give a tendered instruction, or part of a tendered instruction, if: (1) the instruction correctly sets out the law; (2) evidence supports the giving of the instruction; and (3) the substance of the tendered instruction is not covered by the other instructions given. Id. at 1164.

A trial court's decision whether to respond to jury questions is treated on appeal in the same manner as jury instructions. Gantt v. State, 825 N.E.2d 874, 877 (Ind. Ct. App. 2005). Instructing the jury lies within the sole discretion of the trial court. Id. Jury instructions are to be considered as a whole and in reference to each other. Id. An 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. Id. Before a defendant is entitled to a reversal, he or she must affirmatively show that the erroneous instruction prejudiced his substantial rights. Id. An error is to be disregarded as harmless unless it affects the substantial rights of a party. Ind. Trial Rule 61.

The State argues that Alkhalidi waived any claim of error with respect to the instructions because he withdrew his proposed instruction and agreed with the trial court's response to the jury's questions. Alkhalidi argues that while he withdrew his instruction, "[i]t was clear at that point, however, that the trial court was never going to

give this instruction." Appellant's Brief at 10. Even assuming that Alkhalidi preserved this issue, we cannot say that the trial court abused its discretion.

At trial, Alkhalidi proposed the following instruction:

> The Court further instructs you that a oerson [sic] who with the intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the person subsequent to the commission of the offense is not criminally responsible for that offense.
>
> I.C. 35-44-3-2
> Salinas v. State 858 NE2nd 1073 (Ind. App 2006)

Appellant's Appendix at 185. Alkhalidi's counsel argued that the instruction was necessary "to clarify that an accomplice, that assisting somebody after the fact, is not the same as being an accessory to the crime." Transcript at 1415. The trial court suggested modification of the State's instruction on accomplice liability. After some discussion, Alkhalidi's counsel withdrew his request to modify the State's instruction and withdrew his proposed instruction.

During deliberations, the jury asked two questions. The trial court described the questions as follows:

> Juror question 1 reads: Is aiding the same as being an accessory to the crime? What does an accessory after the fact mean? And then it said, lawyers terms question mark. Someone may have mentioned this in closing. That's all I can think.
> Question 2, at what point is a crime over? In other words, in aiding and abetting, does that have to happen during the course of or after the crime? Helping to hide the body may have happened after the actual murder, but is that aiding during the crime or after the crime? Lawyer terms, please – Laymen's terms, please.

Id. at 1644. After some discussion, the trial court proposed the following instruction:

> Factors you may consider to determine whether a person aided another in the commission of the crime include, one, presence at the scene of the crime. Two, companionship of another engaged in the crime. Three, failure to oppose the commission of the crime, and, four, the course of conduct before, during, and after the crime occurred. While the person's presence during the commission of a crime or his failure to oppose the crime as proved are by themselves insufficient to establish accomplice liability. You may consider them with other facts and circumstances tending to show participation. There must be evidence of affirmative conduct either in the form of acts or words from which an inference of common design or purpose to effect the commission of a crime may be reasonably drawn.

Id. at 1651. The following exchange then occurred:

> [Alkhalidi's Counsel]: Okay. I guess my only concern is the definition of aiding and inducing does not say anything about after. The statute only talks about committing the offense.
>
> THE COURT: Well, but and that's – This is the final sentence of this instruction said: There must be evidence of affirmative conduct, either in the form of acts or words from which an inference of common design or purpose to effect the commission of a crime may be reasonably drawn.
>
> [Alkhalidi's Counsel]: Okay. I do like that language.
>
> THE COURT: Huh?
>
> [Alkhalidi's Counsel]: I do like that language.

Id. at 1652-1653. The trial court then gave its proposed instruction to the jury.

Alkhalidi argues that the trial court erred because the jury instructions and the trial court's response to the jury's questions failed to advise the jury that Alkhalidi's mere assistance in hiding the body after Purdiman was murdered would not make him guilty of murder. The trial court instructed the jury on murder as follows:

> To convict [Alkhalidi] of Murder as charged in Count I, the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1. The defendant, Abdullah Alkhalidi
> 2. knowingly
> 3. killed
> 4. another human being, Claude Purdiman, Jr.
>
> *If the State failed to prove each of these elements beyond a reasonable doubt, you must find the defendant not guilty.*
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find the defendant guilty of Murder.

Appellant's Appendix at 108 (emphasis added). The trial court also instructed the jury on aiding, inducing, or causing an offense as follows:

> 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 person who knowingly or intentionally aids, induces, causes, or joins with another person to commit a crime commits that crime himself. A person is responsible for the acts of his accomplices as well as his own. The acts of one person are attributable to all who are knowingly or intentionally acting together during the commission of a crime. Accordingly, the State need not prove, beyond a reasonable doubt, that the defendant personally and acting by himself, committed all of the elements of the crimes with which he is charged. However, *the State must prove, beyond a reasonable doubt, that the defendant and the other person knowingly or intentionally acting together and with the required culpability, committed all of the elements of the crime or crimes with which he is charged.*

Id. at 118 (emphasis added). The trial court also instructed the jury: "Under the law, you must presume that the defendant is innocent, and must continue to do so throughout the

trial, unless the State proves every essential element of the crime with which the defendant is charged beyond a reasonable doubt." Id. at 123. As previously mentioned, in response to the jury's questions, the trial court informed the jury as follows:

> Factors you may consider to determine whether a person aided another in the commission of the crime include, one, presence at the scene of the crime. Two, companionship of another engaged in the crime. Three, failure to oppose the commission of the crime, and, four, the course of conduct before, during, and after the crime occurred. While the person's presence during the commission of a crime or his failure to oppose the crime as proved are by themselves insufficient to establish accomplice liability. You may consider them with other facts and circumstances tending to show participation. There must be evidence of affirmative conduct either in the form of acts or words from which an inference of common design or purpose to effect the commission of a crime may be reasonably drawn.

Transcript at 1651.

The jury was instructed regarding the elements of the offense of murder and was repeatedly instructed that the State was required to prove each element of the offense beyond a reasonable doubt. Because the substance of Alkhalidi's tendered instruction was already covered by other instructions, we conclude that the trial court did not abuse its discretion. See Newman v. State, 505 N.E.2d 442, 445 (Ind. 1987) (holding that the trial court did not err in refusing to give the defendant's tendered instructions because the substance of appellant's tendered instructions were covered by the court's other instructions); Lewis v. State, 898 N.E.2d 429, 434 (Ind. Ct. App. 2008) (holding that the substance of the defendant's tendered instructions were covered by the instructions given

by the trial court and the trial court did not abuse its discretion when it refused to give the defendant's proposed jury instructions), trans. denied.

To the extent that Alkhalidi argues that the trial court abused its discretion by not instructing the jury on the offense of assisting a criminal as a class C felony, we note that Alkhalidi's proposed instruction did not instruct the jury that it could find Alkhalidi guilty of assisting a criminal as a class C felony.[7] Rather, the proposed instruction only stated that "a oerson [sic] who with the intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the person subsequent to the commission of the offense is not criminally responsible for that offense." Appellant's Appendix at 185. Thus, Alkhalidi waived any claim of error with respect to the instructions and it is unavailable on appeal unless the alleged error rises to the level of fundamental error. See Echols v. State, 722 N.E.2d 805, 807 (Ind. 2000). Even assuming that the offense of assisting a criminal was factually included in murder, "failure to give instructions on lesser-included offenses does not constitute fundamental

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[7] Ind. Code § 35-44-3-2 governs the offense of assisting a criminal and provides:

> A person not standing in the relation of parent, child, or spouse to another person who has committed a crime or is a fugitive from justice who, with intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the person commits assisting a criminal, a Class A misdemeanor. However, the offense is:
>
> (1) a Class D felony if the person assisted has committed a Class B, Class C, or Class D felony; and
>
> (2) a Class C felony if the person assisted has committed murder or a Class A felony, or if the assistance was providing a deadly weapon.

error." Metcalf v. State, 451 N.E.2d 321, 326 (Ind. 1983). Accordingly, the trial court did not commit fundamental error by failing to give an instruction on assisting a criminal.

For the foregoing reasons, we affirm Alkhalidi's convictions for theft as a class D felony, robbery as a class B felony, and murder.

Affirmed.

BRADFORD, J., and CRONE, J., concur.