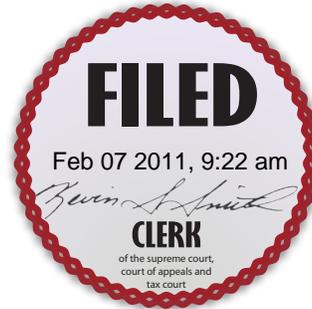


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ARTHUR DAVIS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-1006-CR-742

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Mark D. Stoner, Judge
The Honorable Jeffrey Marchal, Commissioner
Cause No. 49G06-0908-FB-71116

February 7, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Arthur Davis appeals from his convictions of two counts of Class B felony Robbery.¹ Davis contends that the State failed to introduce sufficient evidence to sustain his convictions and that the trial court abused its discretion in instructing the jury. We affirm.

FACTS AND PROCEDURAL HISTORY

At approximately 4:00 a.m. on August 8, 2009, Indianapolis Metropolitan Police Detective Brian Schemenaur and Detective Sergeant Jonathan Hayes were patrolling the Broad Ripple area in Indianapolis looking for robbery suspects. Detective Schemenaur observed a silver Chevrolet Venture minivan containing two black males of larger build, which fit the general description of robbery suspects given to police. The minivan drove “aimlessly” around the area for a time while being observed by police, but did not stop. Tr. p. 113.

At 3:51 a.m. the next morning, Detective Schemenaur and Detective Sergeant Hayes observed the same minivan southbound in the 6400 block of College Avenue toward Broad Ripple. The Detectives began to follow the minivan, and, while stopped in traffic, Detective Sergeant Hayes exited his car and verified that the minivan was, indeed, the one they had seen the night before. Eventually, Detective Sergeant Hayes observed the minivan pull over and parallel park on Guilford Avenue and that two persons exited the minivan at 4:10 a.m. Detective Sergeant Hayes followed the persons on foot, occasionally losing visual contact due to his attempts to avoid being detected. At some point, Detective Sergeant Hayes saw a black male in dark clothing moving toward the

¹ Ind. Code § 35-42-5-1 (2009).

street and then heard noises “like someone was getting hit and struck.” Tr. p. 143. From his vantage point in some bushes, Detective Sergeant Hayes saw “arms [moving] up and down[,]” which he believed to be those of the assailant. Tr. p. 143. When Detective Sergeant Hayes ran out from his hiding place, he observed a white male lying in the middle of the street and two black males walking away, one of whom was Davis, about two to three steps from the white male. The victim was Jay Roemer, from whom a mobile telephone and five dollars had been taken.

Detective George Brian Hughes II responded to the scene and observed two persons walking toward him, one of whom was Davis and the other of whom was LaJuan Barlow. (Tr. 62, 65). Davis threw what appeared to be a mobile phone with a “a very large lit screen as you would see on a Blackberry, iPod, [or] something like that” into a yard. Tr. p. 63. Meanwhile, Matthew Christman approached the scene of Roemer’s attack. Christman had been walking home after leaving work at approximately 4:00 a.m. when he was knocked unconscious approximately twenty to thirty yards from where Roemer had been attacked. (Tr. 45-46). When Christman awoke, he noticed that he had blood on his face and walked toward the police lights. (Tr. 45). Christman’s keys, Blackberry mobile telephone, and between approximately 150 to 300 dollars in cash were missing. (Tr. 46-47). A search of Davis yielded \$170 and Christman’s keys. (Tr. 149-50). Christman’s and Roemer’s telephones were recovered from the nearby yard, and Davis’s fingerprint was later determined to be on Roemer’s. (Tr. 89, 102).

On August 11, 2009, the State charged Davis with two counts of Class B felony robbery. (Appellant's App. 22-23). At trial, Davis tendered the following accomplice liability instruction:

Aiding an Offense is defined by law as follows: Ind. Code § 35-41-2-4. A person who knowingly or intentionally aids another person in committing Robbery is guilty of Robbery even though he does not personally participate in each act constituting the Robbery.

A person may be convicted of Robbery by aiding another to commit Robbery even if the person has not been prosecuted for Robbery or has not been convicted of Robbery or has been acquitted of Robbery.

In order to commit Robbery by aiding another to commit Robbery, a person must have knowledge that he is aiding the commission of the Robbery. To be guilty, he does not have to personally participate in the crime nor does he have to be present when the crime is committed.

Merely being present at the scene of the crime is not sufficient to prove that he aided the crime. Failure to oppose the commission of the crime is also insufficient to prove aiding another to commit the crime. But presence at the scene or failure to oppose the crime's commission are factors which may be considered in determining whether there was aiding another to commit the crime.

Before you may convict the Accused, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Accused
2. knowingly or intentionally
3. aided
4. LaJuan Barlow to knowingly or intentionally commit the offense of Robbery, to-wit: by knowingly or intentionally taking property from Matthew Christman and/or Jay Roemer
5. by using or threatening force on Matthew Christman and/or Jay Roemer
6. or by placing Matthew Christman and/or Jay Roemer in fear.

With respect to the charge of Robbery, if the State fails to prove each of these elements beyond a reasonable doubt, you must find the Accused not guilty of Robbery, a felony, charged in Count I.

Appellant's App. p. 115.

The trial court rejected this tendered instruction and instead delivered Final Instruction 9, which reads as follows:

A person is responsible for the actions of another person when, either before or during the commission of a crime, he knowingly aids, induces, or causes the other person to commit a crime. To aid is to knowingly support, help, or assist in the commission of a crime.

In order to be held responsible for the actions of another, he need only have knowledge that he is helping in the commission of a crime. He does not have to personally participate in the crime nor does he have to be present when the crime is committed.

Presence at the scene of the crime, proof of a defendant's failure to oppose the commission of a crime, companionship with the person committing the offense, and conduct before and after the offense may be considered in determining whether aiding may be inferred.

Appellant's App. p. 128. The jury found Davis guilty as charged, and the trial court sentenced him to two concurrent fifteen-year sentences. (Appellant's App. 206).

DISCUSSION AND DECISION

Whether the State Produced Sufficient Evidence to Sustain Davis's Convictions

When reviewing the sufficiency of the evidence, we neither weigh the evidence nor resolve questions of credibility. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995). We look only to the evidence of probative value and the reasonable inferences to be drawn therefrom which support the verdict. *Id.* If from that viewpoint there is evidence of probative value from which a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt, we will affirm the conviction. *Spangler v. State*, 607 N.E.2d 720, 724 (Ind. 1993).

In order to sustain Davis's convictions of two counts of Class B felony robbery, the State was required to prove that he knowingly or intentionally took property from the presence of Christman and Roemer by using or threatening the use of force or putting them in fear resulting in bodily injury to them. Ind. Code § 35-42-5-1. Davis contends

only that the State failed to prove that he robbed Christman or Roemer or helped Barlow to do so. We cannot agree.

Detective Sergeant Hayes testified that he saw Davis mere feet from Roemer seconds after Roemer was attacked, with nobody else, save Barlow, in the vicinity. The State also introduced testimony that Davis's fingerprint was found on Roemer's stolen mobile telephone, which was found nearby, tending to prove that he had had it in his possession. A reasonable inference to be drawn from this evidence is that Davis is the person who robbed Roemer or, at the very least, helped Barlow to do so. *See, e.g., Crane v. State*, 436 N.E.2d 895, 897 (Ind. Ct. App. 1982) (concluding, in robbery context, that "[p]ossession of recently stolen goods is also circumstantial evidence upon which a guilty verdict may be based."). As for Christman's robbery, the evidence shows that Davis and Barlow were apprehended near the scene of Roemer's attack, approximately twenty to thirty yards from Christman's. The State produced evidence that Davis was in possession of Christman's keys and an amount of money consistent with the amount Christman testified had been taken and that Christman's telephone was recovered from a yard in which an eyewitness saw Davis toss a telephone. As with Roemer's robbery, evidence of Davis's close proximity to Christman's attack coupled with his possession of Christman's recently stolen property supports an inference of guilt. *See id.* The State produced sufficient evidence to sustain Davis's robbery convictions.

II. Whether the Trial Court Abused its Discretion in Instructing the Jury

"Instructing the jury lies solely within the discretion of the trial court, and we will reverse only upon an abuse of that discretion." *Schmid v. State*, 804 N.E.2d 174, 182

(Ind. Ct. App. 2004), *trans. denied*. In determining whether the trial court properly refused a tendered instruction, we consider three factors: (1) whether the tendered instruction correctly states the law; (2) whether there was evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions. *Id.* A defendant is entitled to have the jury instructed correctly on an essential rule of law. *McCarthy v. State*, 751 N.E.2d 753, 755 (Ind. Ct. App. 2001), *trans. denied*. However, before a defendant is entitled to a reversal, he must affirmatively demonstrate that the instructional error prejudiced his substantial rights. *Howard v. State*, 816 N.E.2d 948, 962 (Ind. Ct. App. 2004). Jury instructions are to be considered as a whole, and we will not find that the trial court abused its discretion unless we determine that the instructions taken as a whole misstate the law or otherwise mislead the jury. *Schmid*, 804 N.E.2d at 182.

When we consider the jury instructions as a whole, we conclude that the trial court properly instructed the jury on accomplice liability. Davis contends that the jury was not properly instructed as to the all of the elements that the State was required to prove in order to convict him of being an accomplice to a robbery. Final Instructions 6 and 7 provided the jury with the elements of robbery, and Final Instruction 9 informed the jury that it could find Davis guilty as an accomplice only if it found that he “aid[ed], induce[d], or cause[d] the other person to commit a crime.” Appellant’s App. p. 128. In summary, the jury was instructed that, in order to find Davis to be an accomplice to robbery, it would have to find that someone else had committed the robbery and was also given the elements of that crime. We do not think that it was necessary to instruct the

jury that it needed to find a particular person was the principal robber. We conclude that the instructions, as a whole, were sufficient to inform the jury on what it was required to find in order to find Davis guilty as an accomplice.

Davis also seems to argue that the instructions improperly left the jury with the impression that it could find Davis guilty as an accomplice based on his mere presence at the scene of the crime. Davis suggests that the instructions allowed the jury to convict on no more than proof of “‘passive conduct,’ such as failure to stop the principal actor or to oppose the crime[.]” Appellant’s Br. p. 19. We conclude, however, that Final Instruction 9 made it abundantly clear that Davis’s active participation was required. As previously mentioned, Final Instruction 9 contained the following passage:

A person is responsible for the actions of another person when, either before or during the commission of a crime, he knowingly *aids, induces, or causes* the other person to commit a crime. To aid is to knowingly *support, help, or assist* in the commission of a crime.

In order to be held responsible for the actions of another, he need only have knowledge that he is *helping* in the commission of a crime.

Appellant’s App. p. 128 (emphases added). Quite simply, the emphasized words in the above passage describe *active* assistance and make it clear that more than proof of a failure to stop is required. The jury was not left with an incorrect impression of the law on this point. The trial court did not abuse its discretion in instructing the jury.²

In any event, we conclude that any error the trial court may have committed in instructing the jury can only be considered harmless. “Errors in the giving or refusing of

² While we conclude that the trial court did not abuse its discretion in instructing the jury regarding accomplice liability, Davis’s proposed instruction, which closely tracks Indiana Pattern Criminal Jury Instruction 2.11, was also a correct statement of the law while being more clear and thorough. We think that the better practice in instructing a jury on accomplice liability is to deliver an instruction based on Pattern Instruction 2.11.

instructions are harmless where a conviction is clearly sustained by the evidence and the instruction would not likely have impacted the jury's verdict." *Randolph v. State*, 802 N.E.2d 1008, 1013 (Ind. Ct. App. 2004), *trans. denied*. An instructional error will result in reversal when we cannot say with complete confidence that a reasonable jury would have rendered a guilty verdict had the correct instruction been given. *Id.*

We can say with complete confidence here that a reasonable jury would have rendered the same verdict even assuming that it had been incorrectly instructed on accomplice liability. To say the very least, the State presented a strong case. The Jury heard evidence that Davis was mere feet away from Roemer with no one else but Barlow anywhere in sight seconds after he was robbed and that he was in possession of Roemer's stolen telephone on which was found his fingerprint. The jury also heard evidence that within easy walking distance was Christman, who had apparently been beaten in the head from behind and robbed minutes beforehand in precisely the same way as had Roemer. The jury heard evidence that Davis possessed Christman's stolen telephone, keys, and an amount of money consistent with Christman's estimate of what he had been carrying. Davis's convictions are clearly sustained by ample evidence and we think it very unlikely that any instructional error that might have occurred impacted the jury's verdict.

We affirm the judgment of the trial court.

KIRSCH, J., and CRONE, J., concur.