



Defendant-Appellant Desmond D. Clayton appeals his convictions for robbery, a Class B felony, Indiana Code section 35-42-5-1 (1984), and battery, a Class A misdemeanor, Indiana Code section 35-42-2-1 (2009). We affirm the judgment of the trial court.

On January 18, 2010, Chonita Freeling was at home and received a text from a number that she recognized as belonging to her friend Sharde Wilson. Freeling went to Wilson's apartment and knocked on the door. Clayton, who Freeling knew to be Wilson's brother, opened the door. When Freeling entered the apartment, a man later identified as Eric Gilbert closed and locked the door behind her. Next, Clayton and Gilbert struck and kicked her. Clayton pulled out a gun, which was later identified as a pellet gun, and pointed it at Freeling's head. Clayton and Gilbert demanded money and "weed" from her. Tr. p. 29. They both went through Freeling's pockets, and one of them took her mobile phone and car keys.

The State charged Clayton with the offenses described above, plus criminal confinement and strangulation. The State added a second charge of robbery. A jury found Clayton guilty of two counts of robbery and battery.<sup>1</sup> Clayton now appeals.

Clayton raises one issue, which we restate as whether the trial court abused its discretion by rejecting one of his proposed jury instructions. When a party challenges a trial court's refusal of a tendered jury instruction, the court on appeal performs a three-part evaluation. First, we ask whether the tendered instruction is a correct statement of

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<sup>1</sup> The additional robbery conviction was vacated by the trial court upon double jeopardy considerations. No judgment of conviction was entered upon that jury verdict.

the law. Walden v. State, 895 N.E.2d 1182, 1186 (Ind. 2008). Second, we examine the record to determine whether there was evidence present to support the tendered instruction. Id. Third, we determine whether the substance of the tendered instruction was covered by another instruction or instructions. Id. This evaluation is performed in the context of determining whether the trial court abused its discretion when it rejected the instruction. Id. The trial court does not abuse its discretion when it rejects an instruction that is already covered by others given at trial. Forte v. State, 759 N.E.2d 206, 209 (Ind. 2001).

In this case, Clayton tendered the following proposed instruction and authority to the court:

Multiple persons have been charged and, in some cases, convicted of the same acts for which the Accused is on trial. In reaching a verdict, however, you must bear in mind that guilt is individual. Your verdict as to each Accused must be determined separately with respect to him, solely on the evidence, or lack of evidence, presented against him without regard to the guilt or innocence of anyone else. In addition, some of the evidence in this case was limited to one Accused. Let me emphasize that any evidence admitted solely against one Accused may be considered only as against that person and may not, in any respect, enter into your deliberations on any other Accused.

Authority: United States v. Jackson (8th Cir. 1982), 696 F.2d 578.

Appellant's App. p. 69.

The court rejected Clayton's proposed instruction, ruling that his instruction would be covered by the final instruction on accomplice liability. The court's instruction on accomplice liability provided 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, 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, [sic]

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 the charged crime. He does not have to personally participate in the crime nor does he have to be present when the crime is committed.

Proof of the defendant [sic] 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.

Mere presence at the scene of [the] alleged crime or failure to oppose the crime is not, in [and] of itself, aiding inducing or causing the commission of a crime. Neither is negative acquiescence sufficient standing alone. You must not convict the defendant of aiding an offense unless you find beyond a reasonable doubt that the Defendant knowingly or intentionally participated in some conduct of an affirmative nature.

Appellant's App. pp. 111-112.

Clayton contends that his tendered instruction "correctly indicates that accomplice liability must be based on the defendant's voluntary conduct and not merely on guilt by association." Appellant's Br. p. 9. We note that the jury was, in fact, instructed that accomplice liability requires proof beyond a reasonable doubt that "the Defendant knowingly or intentionally participated in some conduct of an affirmative nature."

Appellant's App. p. 112.

Clayton concedes that he was guilty of battery against Freeling, but contends that "the evidence that he participated in the robbery was not overwhelming." Appellant's Br. p. 9. In this respect he implies that the evidence of his participation was not so

overwhelming as to render harmless the alleged error in the refusal of his instruction. This, of course, presupposes that refusal of the instruction was error. We disagree.

We determine that the court's accomplice liability instruction is a correct statement of the law and is a more accurate elucidation given the facts of this case. As such, it was an appropriate replacement for Clayton's tendered instruction.

The court's instruction informed the jury that in order to convict Clayton as an accomplice, the evidence must demonstrate that Clayton personally aided in the crimes at issue by knowing or intentional conduct. We have previously upheld similar language for accomplice liability instructions. See Boney v. State, 880 N.E.2d 279, 293-94 (Ind. Ct. App. 2008), trans. denied (reviewing an instruction that stated that the State had to prove that the defendant knowingly or intentionally aided in the murder); Hopkins v. State, 747 N.E.2d 598, 608 (Ind. Ct. App. 2001), trans. denied (upholding an instruction that stated that a person is responsible for the acts of another when he knowingly supports, helps, or assists in the commission of a crime). Furthermore, the court's instruction tracks the pattern jury instruction on accomplice liability. See Ind. Pattern Jury Instruction (Criminal) 2.11 (3<sup>rd</sup> ed. 2010). The preferred practice is to use the pattern jury instructions. Buckner v. State, 857 N.E.2d 1011, 1016 (Ind. Ct. App. 2006).

Clayton concedes that the court's instruction "provides the basic principles of accomplice liability." Appellant's Br. p. 9. However, Clayton argues that his tendered instruction "provides additional clarification." *Id.* Clayton fails to explain how his instruction would have clarified matters for the jury or to cite to Indiana authority approving of his proposed language. We conclude that the trial court did not abuse its

discretion by rejecting Clayton's proposed jury instruction. See Boney, 880 N.E.2d at 295 (affirming the court's rejection of the defendant's proposed instruction on accomplice liability).

For the reasons stated above, we affirm the judgment of the trial court.

Affirmed.

BAKER, J., and CRONE, J., concur.