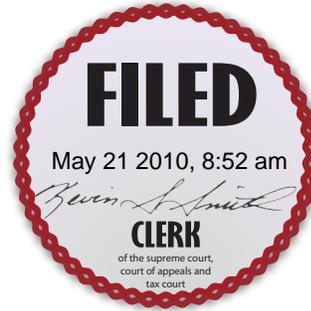


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ALLEN HORTON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 27A02-0912-CR-1219

APPEAL FROM THE GRANT CIRCUIT COURT

The Honorable Mark E. Spitzer, Judge

Cause No. 27C01-0808-FA-158

May 21, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Allen Horton appeals his conviction for Robbery, as a Class A felony.¹ We affirm.

Issues

Horton raises two issues on appeal:

- I. Whether there was sufficient evidence to support his conviction based on accomplice liability; and
- II. Whether the trial court abused its discretion in refusing his two proffered jury instructions on accomplice liability.

Facts and Procedural History

August 14, 2008, Darrell Hollins and Matthew Dragoo drove to Marion, Indiana, where Hollins went into Tina Jones's ("Tina") house to purchase twenty Lortabs. When Hollins returned to the car, he told Dragoo that Tina was going to have her son call Hollins so that he could buy marijuana from the son at a low price. Shortly thereafter, Tina called Hollins to give him her son's phone number. After several short conversations, Ralph Jones ("Ralph"), Tina's son, agreed to sell Hollins two pounds of marijuana for \$2300. Hollins and Ralph agreed to meet at a particular apartment building.

Ralph then called his friend Maurice McClung, also known as "Mo," to see if Maurice could supply the needed two pounds of marijuana. That afternoon, Ralph, Maurice, Horton, and Cletus Luster met in Tina's garage. While they were together, the group had several phone conversations with Hollins to verify that Hollins had the money and truly wanted to

¹ Ind. Code § 35-42-5-1.

buy two pounds of marijuana. At some point, Maurice looked over at some bags of red mulch in the garage and took them despite Ralph's objection. The group then discussed how they were going to rip Hollins off by taking his money without having any marijuana. When the meeting was over, Horton left with Cletus and Maurice, who took the mulch with him.

Around 5 p.m., Hollins, accompanied by Dragoo, drove to the designated apartment building and parked near Ralph's black Grand Am. Hollins exited his car and was greeted by Ralph and Joey Bolden, who were sitting on the sidewalk. Dragoo remained in the car because Hollins had been instructed to come alone to the deal.

Ralph led Hollins towards the apartment building with Bolden trailing behind. Waiting just inside the foyer of the building were Horton and Maurice, both of whom Hollins knew. Hollins greeted the two and headed towards a blue duffel bag that was perched on the stairway near Horton and Maurice. Immediately after opening the bag, Hollins realized that it contained mulch, not marijuana. At that moment, Hollins thought to himself that the four guys surrounding him were going to rob him.

Hollins looked up and over to his right and saw Maurice give Ralph a "weird look." Trial transcript at 185. Maurice then turned towards Hollins and started shooting a forty-five caliber gun at Hollins. Hollins was shot in the leg, near his heart, in the humerus (upper arm) and twice in the stomach. Hollins kicked at and subsequently fell out the apartment foyer door. Ralph and Horton tried to drag Hollins back inside the building but Hollins jerked away from them and was able to run out of the building. While doing so, Hollins had pulled out his money and tossed it while he ran. But Hollins was stopped when Maurice shot him

again in the back. Hollins fell to the ground only to be shot once more. Hollins blacked out momentarily and regained consciousness to see Ralph, Bolden and McClung picking up his money from the ground.

During these events, Drago was in Hollins's car. He saw one of the bigger guys come out of the apartment building and a few seconds later, Drago looked up to see Hollins walking quickly away from the building. Immediately behind Hollins was Maurice, who then shot Hollins in the back. The other three males were eventually standing behind Maurice when he fired the final shot at Hollins, who had already fallen to the ground. All four of the men then started picking up Hollins's scattered money before running from the scene.

On August 18, 2008, the State charged Horton with Robbery, as a Class A felony. After a jury trial, Horton was found guilty as charged and sentenced to thirty-five years in prison.

Horton now appeals.

Discussion and Decision

I. Sufficiency of the Evidence

First, Horton contends that there is insufficient evidence to show that he was a part of a concerted plan to rob Hollins. When reviewing the sufficiency of the evidence to support a conviction, we will consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We will not assess the credibility of the witnesses or reweigh the evidence. Id. We will affirm the conviction

unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. Id.

To convict Horton as charged, the State had to prove that Horton knowingly or intentionally aided, induced or caused another person to commit robbery of Hollins that resulted in serious bodily injury. See Ind. Code §§ 35-41-2-4 and 35-42-5-1. Robbery requires that a person knowingly or intentionally take property from another person by using or threatening the use of force or by placing a person in fear. See Ind. Code § 35-42-5-1. In Indiana, an accomplice is criminally responsible for all acts committed by a confederate which are a probable and natural consequence of their concerted action. Alvies v. State, 905 N.E.2d 57, 61 (Ind. Ct. App. 2009). “While mere presence at the scene of the crime is insufficient to establish accomplice liability, presence 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.” Id.

Horton contends that the evidence only establishes that he acquiesced to a plan to assist in selling Hollins a substituted substance. We disagree. The evidence demonstrates that Horton participated in the meeting with Ralph, Maurice and Cletus where the group discussed how to rip off Hollins. After the meeting, Horton left with Maurice, who had taken the bag of mulch, the contents of which were later placed in plastic grocery bags and then in a blue duffel bag. When Ralph and Bolden arrived at the apartment building, it was Horton who exited the apartment to inform them where he and Maurice would be waiting. The apartment in the building where mulch was found scattered in the kitchen sink and on the

floor was the residence of Jordan Jones, the cousin and good friend of Horton. While Jordan also knew Ralph and Maurice, only Horton had been to Jordan's apartment prior to the shooting. Jordan testified that Horton regularly hung out at the apartment.

As instructed, Hollins was the only person to go to make the purported transaction and was led to a small foyer of the apartment building where he was surrounded by four men. When Hollins saw the duffel bag on the stairs by Maurice and Horton, he walked further into the small foyer to examine the contents. Hollins immediately realized the bag contained mulch and knew that the group was going to take his money. After Hollins was shot several times and fell out the door, Horton and Ralph attempted to grab Hollins to pull him back into the apartment foyer. After Maurice took his final shots at Hollins, all four men scrambled to pick up Hollins's money from the ground before fleeing the scene. This evidence is sufficient to support the verdict that Horton was an accomplice in the robbery of Hollins that resulted in serious bodily injury.

II. Accomplice Jury Instructions

Second, Horton contends that the trial court abused its discretion in providing an incomplete instruction regarding accomplice liability. Instructing a jury is a matter within the discretion of the trial court. VanWanzelee v. State, 910 N.E.2d 240, 246 (Ind. Ct. App. 2009), trans. denied. When reviewing the decision of a trial court to refuse tendered instructions, we consider “whether the instruction (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions.” Schumm v. State, 866 N.E.2d 781, 791 (Ind. Ct. App. 2007) (quoting Wal-Mart Stores, Inc.

v. Wright, 774 N.E.2d 891, 893 (Ind. 2002)), corrected on reh'g on other grounds. Horton only challenges whether portions of his proffered instructions were not covered in substance by the instruction regarding accomplice liability that the trial court provided the jury. Therefore, we will reverse the decision only if we conclude that the trial court abused its discretion. Id.

The instruction provided to the jury by the trial court regarding accomplice liability is as follows:

An accomplice is criminally liable for everything done by a confederate which was a probable and natural consequence of a common plan. An accomplice need not act out each element of an offense with which he is charged; the acts of one accomplice may be imputed to another. Although mere presence at the scene of the crime, standing along, is not sufficient to permit an inference that one participated in a crime, such presence may be considered in conjunction with other evidence as one of the factors in the determination of guilt. Other factors to be considered include companionship with one engaged in a crime and the course of conduct before and after the occurrence of the offense.

Appendix at 18. Horton concedes that the instruction is accurate but contends that it is incomplete because it did not include the following statements:

Negative acquiescence is not enough to constitute a person being guilty of aiding and abetting the commission of a crime.

This rule of criminal responsibility for the acts of others is subject to the reasonable limitation that the particular act or acts of one member of the party, for which the other associates or confederates are to be held liable, must be shown to have been done for the furtherance or in prosecution of the common object and design for which the persons combined together.

Appellant's Brief at 10 and 11 (citing Wright v. State, 690 N.E.2d 1098, 1099 and 1110 (Ind. 1997)). These concepts are contemplated by the instruction given by the trial court. The

concept that “negative acquiescence” (acceding by not objecting to the plan) alone is insufficient to establish guilt is covered in the portion that to find guilt the jury must look beyond mere presence to other factors including the “course of conduct before and after the occurrence of the offense.” In other words, guilt requires affirmative action on the part of the defendant.

The limitation of responsibility to acts in furtherance of the common objective is stated with more simplicity in the instruction given by the trial court in the statement that liability arises for any action done by a confederate which “was a probable and natural consequence of a common plan.” Thus, the concepts of the proffered instructions were covered by the instruction provided by the trial court. As long as the trial court properly instructs the jury on the burden of proof and informs the jury of Horton’s defenses, it would be within its discretion to refuse the proffered instructions. See id. at 793.

Affirmed.

MAY, J., and BARNES, J., concur.