



Robert Emerson appeals his conviction for battery as a class C felony.<sup>1</sup> Emerson raises one issue, which we revise and restate as whether the evidence is sufficient to sustain his conviction. We affirm.

The facts most favorable to the conviction follow. Prior to December 2009, Andrew Myers grew up in the same neighborhood as Emerson and Emerson's brothers Marcus and Matthew. At some point, Myers cooperated with an investigation by purchasing narcotics and providing information to the police. Around 9:00 or 10:00 p.m. on December 5, 2008, Myers and his pregnant fiancée Krystle Brooks drove from South Bend to a bar in Elkhart. On the return drive to South Bend, the police in Elkhart stopped Myers and Brooks's vehicle and searched it with their permission before permitting Myers and Brooks to leave.

As the police were stopping them, Myers received a phone call at 12:47 a.m. from Emerson. Myers told Emerson that they would call back when they returned to South Bend. Myers and Brooks then returned to South Bend and went to a club until the club closed at 3:00 a.m. Myers's cell phone registered a missed call from Emerson at 2:33 a.m. Twenty-five minutes later, Myers's cell phone rang with a call from Emerson, and Brooks answered the phone, but the caller "hung up right when [she] answered." Transcript at 48. Brooks then dialed Emerson's number and handed the phone to Myers.

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<sup>1</sup> Ind. Code § 35-42-2-1 (Supp. 2008) (subsequently amended by Pub. L. 131-2009, § 73 (eff. July 1, 2009)).

Emerson told Myers, “I need to holler at you.”<sup>2</sup> Id. at 18. Myers asked Emerson where he was, and Emerson said: “Right behind you.” Id. Emerson requested that they go to Sam’s, a “food mart.” Id. Myers pulled his vehicle into the parking lot at Sam’s, and a vehicle pulled in directly behind him. Myers exited his vehicle, and Emerson exited the passenger seat of his vehicle. Myers and Emerson talked briefly and walked back toward Emerson’s car.

Emerson’s brother Matthew exited the back seat of Emerson’s vehicle and told Myers to enter the vehicle. Myers complied and entered the backseat on the passenger side. After entering the vehicle, Myers saw Emerson’s brother Marcus, Emerson’s cousin Ty Antwan Redding, and Emerson’s “baby’s momma” in the vehicle.

Matthew walked “straight to” Myers’s vehicle and entered the backseat of Myers’s car. Id. at 28. Matthew then exited the car, came around, and tapped on the window, and Brooks rolled the window down. Emerson told Myers, “Look, he’s trying to get your girl.” Id. at 29. Ty then displayed a gun and said, “You snitch ass n\*\*\*\*\*, give me everything you got.” Id. Myers attempted to exit the vehicle. Marcus jumped out of the car and Ty and Marcus attempted to push Myers back into the vehicle. Ty struck Myers a few times with the gun, and Myers gave them all the money that he had on him. Matthew then said, “Shoot that snitch ass n\*\*\*\*\*,” and Ty shot Myers in the leg. Id. at 31. Myers, who was unarmed, observed that Marcus, Matthew, and Ty all had guns. While this altercation occurred, Emerson sat in the front passenger seat of his vehicle.

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<sup>2</sup> At trial, Myers indicated that the phrase “[h]oller at you” is “another way of saying to talk, to talk to someone.” Transcript at 43.

Meanwhile, Matthew told Brooks to exit the car, and Brooks started laughing and asked him why, and Matthew said, “Bitch, get out the car,” and displayed a gun. Id. at 50. Brooks exited the car, and Matthew pointed the gun “to the side of [Brooks’s] stomach.” Id. at 51. Matthew asked Brooks, “Where’s the stuff at, where’s the s\*\*\* at?” Id. Brooks gave Matthew fifteen dollars, and Matthew struck Brooks with the gun.

Matthew was yelling in Brooks’s face when Emerson “came up to” Brooks. Id. at 52. Emerson attempted “to get [Brooks] to sit back in the car.” Id. at 53. Emerson said “something about catching another case or something.” Id. at 58. Emerson touched Brooks’s stomach, and said, “Damned [sic], you pregnant already?” Id. at 53. Brooks said “Yeah,” and Emerson said, “[t]hat is what saved [you] from an ass whopping.” Id.

When Myers was shot, a vehicle stopped in the middle of the street. Someone said, “Who is that?” Id. at 33-34. Myers said, “[i]t’s the feds, you guys are going down.” Id. at 34. Emerson and the others fled in Emerson’s vehicle. Id. Myers called 911, and Brooks drove him to the hospital.

The State charged Emerson as an accomplice with: Count I, robbery as a class A felony; Count II, robbery as a class B felony; Count III, battery as a class C felony; and Count IV, carrying a handgun without a permit as a class A misdemeanor. At the beginning of the bench trial, the prosecutor moved to dismiss Count IV, which the trial court dismissed. After a bench trial, the court found Emerson not guilty of Counts I and II and guilty of Count III, battery as a class C felony. The court sentenced Emerson to the Department of Correction for seven years.

The issue is whether the evidence is sufficient to sustain Emerson's conviction for battery as a class C felony. Emerson argues that "[t]he direct evidence does not show that [he] encouraged the crime to occur nor does it show whether he opposed it." Appellant's Brief at 8. Emerson also argues that "[a]dmittedly Emerson called Myers that evening. However it was Myers who called him back, not [Emerson] calling for a must meeting." Id. The State argues that "the evidence clearly shows that [Emerson] was present at the crime scene, that he was actively engaged with his brothers and cousin in what transpired, that he did not oppose the crime against his friend Andrew Myers, and that his course of conduct before, during, and after the crime demonstrated his active and knowing involvement in the crime against Mr. Myers." Appellee's Brief at 10.

When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the judgment. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). 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. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the judgment. Id.

The offense of battery as a class C felony is governed by Ind. Code § 35-42-2-1, which provides that "[a] person who knowingly or intentionally touches another person in

a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is . . . a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon . . . .” Under the theory of accomplice liability, Indiana Code § 35-41-2-4 provides that “[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.” “[T]he Indiana statute governing accomplice liability does not establish it as a separate crime, but merely as a separate basis of liability for the crime charged.” Hampton v. State, 719 N.E.2d 803, 807 (Ind. 1999).

Accomplice liability applies to the contemplated offense and all acts that are a probable and natural consequence of the concerted action. Wieland v. State, 736 N.E.2d 1198, 1202 (Ind. 2000). Mere tangential involvement in the crime can be sufficient to convict a person as an accomplice. Berry v. State, 819 N.E.2d 443, 450 (Ind. Ct. App. 2004) (citing Ajabu v. State, 693 N.E.2d 921, 937 (Ind. 1998)), trans. denied. “[T]o sustain a conviction as an accomplice, there must be evidence of the defendant’s affirmative conduct, either in the form of acts or words, from which an inference of a common design or purpose to effect the commission of a crime may be reasonably drawn.” Peterson v. State, 699 N.E.2d 701, 706 (Ind. Ct. App. 1998) (citing Buhr v. State, 274 Ind. 370, 372, 412 N.E.2d 70, 71 (1980)).

Factors that are to be considered in determining accomplice liability include: (1) presence at the scene of the crime; (2) companionship with another engaged in a crime; (3) failure to oppose the commission of the crime; and (4) the course of conduct before, during, and after the crime occurred. Garland v. State, 719 N.E.2d 1236, 1237 (Ind. 1999), reh'g denied. While the defendant's presence during the commission of the crime or his failure to oppose the crime are, by themselves, insufficient to establish accomplice liability, the trier of fact may consider them along with other facts and circumstances tending to show participation. Id. Emerson does not argue that the elements of battery were not met, but that he was not an accomplice. Accordingly, we will examine each of the factors for determining accomplice liability.

First, Myers and Brooks both testified that Emerson was present at the scene of the crime.

Second, there is evidence that speaks to Emerson's companionship with the individuals that engaged in the crime. Emerson arrived in the vehicle with his cousin Ty and his brothers Marcus and Matthew. Emerson was present when Ty called Myers a "snitch" and displayed a gun. Transcript at 29. Emerson told Matthew "something about catching another case or something," id. at 58, and Emerson told Brooks that her pregnancy was "what saved [her] from an ass whopping." Id. at 53. This statement supports the inference that Emerson had agreed that Myers or Brooks would be beaten. See Ransom v. State, 850 N.E.2d 491, 497 (Ind. Ct. App. 2006) (holding that defendant's statement that the other perpetrator should "[s]top. . . . That's enough," could support the

inference that she and the other perpetrator had agreed that the victim would be only slightly, and not repeatedly, beaten). After Ty shot Myers, Emerson fled with his brothers and cousin.

Third, nothing in the record suggests that Emerson opposed the battery of Myers. During the altercation in which Marcus and Ty attempted to push Myers back into the backseat of the passenger side of the vehicle, Emerson sat in the front passenger seat.

Fourth, Emerson's behavior before, during, and after the battery is also damning. Emerson called Myers at 12:47 a.m. Myers's cell phone registered a missed call from Emerson at 2:33 a.m. Twenty-five minutes later, Myers's cell phone rang with a call from Emerson, and Brooks answered the phone, but the caller "hung up right when [she] answered." Transcript at 48. Brooks then dialed the number for Emerson and handed the phone to Myers. Emerson told Myers, "I need to holler at you." *Id.* at 18. Myers complied with Emerson's request that they go to Sam's. Emerson exited the vehicle, talked briefly with Myers, and walked back toward his car with Myers. Emerson stated that Brooks's pregnancy was "what saved [her] from an ass whopping." *Id.* at 53. Further, after Ty shot Myers, Emerson fled with his brothers and cousin.

Considering the four factors in determining accomplice liability and the evidence the State presented against Emerson, we conclude that there was sufficient evidence to convict Emerson of aiding in the battery of Myers. *See, e.g., Ransom*, 850 N.E.2d at 497 (holding that the evidence was sufficient to sustain the jury's conclusion that the defendant was an accomplice in battery).

For the foregoing reasons, we affirm Emerson's conviction for battery as a class C felony.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.