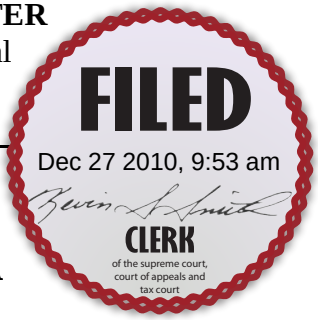
ATTORNEY FOR APPELLANT:

ELIZABETH A. GABIG
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana



IN THE COURT OF APPEALS OF INDIANA

D.R.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-1003-JV-436
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE MARION SUPERIOR COURT[1]
The Honorable Marilyn A. Moores, Judge
The Honorable Gary K. Chavers, Magistrate
Cause No. 49D09-1001-JD-209

December 27, 2010

[1] This cause originated in Tippecanoe County, where the Honorable Loretta H. Rush presided over the fact-finding hearing. It was subsequently transferred to Marion County for disposition.

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Respondent D.R. appeals the juvenile court's adjudicating him to be a delinquent child based upon the offenses of Class B felonies Attempted Robbery[2] and Attempted Carjacking[3] if committed by an adult. Upon appeal, D.R. contends that there is insufficient evidence to support either adjudication and that his true findings violate Indiana prohibitions against double jeopardy. We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of November 22, 2009, Ernesto Artega, who was driving his vehicle on Interstate 65 near Lafayette, reported being shot at by someone in a Chevrolet Blazer. Authorities apprehended the Blazer and found D.R. in the back seat. Persons identified to be Carlos Coyuchi and Luis Rosas were sitting in the driver's seat and passenger seat, respectively. Authorities found a handgun beneath the front passenger seat. In addition, authorities found a magazine and a loose unfired bullet, which fit into the magazine, in the front passenger seat, and another loose bullet, which also fit into the magazine, in the back seat.

D.R. later made statements to authorities. D.R. admitted knowing that Coyuchi and Rosas planned to stop Artega's vehicle and take his money and car. D.R. additionally

[2] Ind. Code §§ 35-42-5-1 (2009); 35-41-5-1 (2009).
[3] Ind. Code §§ 35-42-5-2 (2009); 35-41-5-1 (2009).

admitted that he was "a little bit" involved in the plan, and that he put his hood up and rolled down his window during the incident. Exh. 10. When asked what he would have done if, upon stopping Artega, Artega would have fought back, D.R. indicated he would have helped Coyuchi and Rosas.

Coyuchi similarly testified at the hearing that he and Rosas spoke about robbing Artega of his vehicle, that D.R. spoke about and understood this plan, and that part of the plan was for D.R. to share in the spoils. Coyuchi also testified, however, that D.R. stated, "No," at some point before the shooting and indicated his belief that the plan was a bad idea.

On November 30, 2009, the State filed an information in Tippecanoe County alleging D.R. to be a delinquent child based upon the following offenses if committed by an adult: Class B felony conspiracy to commit robbery; Class B felony attempted robbery; Class B felony conspiracy to commit carjacking; and Class B felony attempted carjacking. Following a fact-finding hearing on January 19 and 22, 2010, the juvenile court found all of the allegations to be true. On January 27, 2010, the juvenile court issued an amended order concluding that only the allegations based upon attempted robbery and attempted carjacking were true. This cause was subsequently transferred to Marion County for disposition. This appeal follows.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Upon appeal, D.R. contends that there is insufficient evidence to support the true findings. According to D.R., the evidence is inadequate to establish that he was Coyuchi's

and Rosas's accomplice. In making this argument, D.R. focuses upon the evidence that he was younger than Coyuchi and Rosas, and that he sat in the backseat of the vehicle and said "No" prior to the shootings.

In reviewing the sufficiency of the evidence in a juvenile adjudication, "we neither re-weigh the evidence nor judge the credibility of the witnesses. Rather, we look only to the evidence most favorable to the trial court's judgment and to the reasonable inferences to be drawn from that evidence." *K.S. v. State*, 849 N.E.2d 538, 543 (Ind. 2006). We affirm if there is substantial probative evidence to support the conclusion. *Id.*

Pursuant to Indiana Code section 35-41-2-4 (2009), a person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense. It is not necessary that a person participate in every element of a crime to be convicted of that crime under a theory of accomplice liability. *Bruno v. State*, 774 N.E.2d 880, 882 (Ind. 2002). In determining whether there was sufficient evidence for purposes of accomplice liability, we consider such factors as: (1) presence at the scene of the crime; (2) companionship with another at the scene of the crime; (3) failure to oppose commission of crime; and (4) course of conduct before, during, and after occurrence of crime. *Id.* 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 factfinder may consider them along with other facts and circumstances tending to show participation. *Garland v. State*, 719 N.E.2d 1236, 1238 (Ind. 1999).

Here, D.R. was present at the scene of the crime; he was a companion to Coyuchi and Rosas, having voluntarily driven with them while the parties discussed forcing Artega's vehicle off the road and taking his vehicle and money; D.R. was prepared to help Coyuchi and Rosas in the event that Artega fought back; and he opened his window and donned a hood at the time of the shootings, supporting the reasonable inference that he was complicit in—and facilitating—their efforts to shoot Artega's vehicle. This evidence, together with D.R.'s admitted involvement in the plan, support the conclusion that he was acting in concert with Coyuchi and Rosas. To the extent D.R. points to his relative youth, backseat position, and alleged interjection of "no" as evidence to the contrary, he is simply inviting us to reweigh the evidence, which we decline to do. Accordingly, we conclude that D.R.'s claim of error based upon insufficient evidence warrants no relief.

II. Double Jeopardy

D.R. contends, and the State does not dispute, that his true findings violate Indiana prohibitions against double jeopardy. Article I, Section 14 of the Indiana Constitution provides that "No person shall be put in jeopardy twice for the same offense." In *Richardson v. State*, 717 N.E.2d 32, 49 (Ind. 1999), the Indiana Supreme Court developed a two-part test for Indiana double jeopardy claims, holding that

> two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to *either* the statutory elements of the challenged crimes *or* the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense.

(Emphasis in original). In articulating the "actual evidence test" as a method for evaluating double jeopardy claims, the *Richardson* court explained as follows:

> Under this inquiry, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.

717 N.E.2d at 53. Significantly, "under the *Richardson* actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." *Spivey v. State*, 761 N.E.2d 831, 833 (Ind. 2002).

Pursuant to Indiana Code sections 35-41-5-1 and 35-42-5-1, Class B felony attempted robbery is defined as knowingly or intentionally engaging in conduct constituting a substantial step toward taking property from another person by using or threatening the use of force, or putting the person in fear, while armed with a deadly weapon. Consistent with these statutory provisions, the State's petition alleging D.R. to be a delinquent child with respect to the offense of attempted robbery stated as follows:

> On or about the 22nd day of November, 2009, said child, while armed with a deadly weapon, that is: a handgun, did knowingly or intentionally attempt to take property, that is: a 1997 Ford Expedition, from the person or presence of Ernesto Artega, by using or threatening the use of force, by by [sic] [D.R.], Luis Angel Rosas-Najera and/or Carlos Coyuchi-Antonio following said victims from Indianapolis, Indiana. While traveling Northbound on I-65, in Tippecanoe County, Indiana, Luis Angel Rosas-Najera fired a handgun at said victim in an attempt to stop the victim and take his vehicle and/or other personal belongings., [sic] which constituted a substantial step toward the commission of Robbery.

App. pp. 18-19.

Pursuant to Indiana Code sections 35-41-5-1 and 35-42-5-2, Class B felony attempted carjacking is defined as knowingly or intentionally engaging in conduct constituting a substantial step toward taking a motor vehicle from another person by using or threatening the use of force or putting the person in fear. Consistent with these statutory provisions, the State's petition alleging D.R. to be a delinquent child with respect to the offense of attempted carjacking, stated as follows:

> On or about the 22nd day of November, 2009, said child did knowingly or intentionally attempt to take a motor vehicle, that is: a 1997 Ford Expedition, from the person or presence of Ernesto Artega by using or threatening the use of force or by putting said person in fear.

App. p. 19.

The State concedes that both charges relied upon the same evidence, specifically D.R.'s and/or his companions' use of a handgun as a show of force as a substantial step toward stopping Artega to take his vehicle.[4] To the extent the attempted robbery names Artega's personal belongings in addition to his vehicle, and therefore arguably rests upon different evidence, the Single Larceny Rule prevents a person from being convicted of two crimes when several articles of property, belonging to the same person, are taken at the same time and place. *See Raines v. State*, 514 N.E.2d 298, 300 (Ind. 1987), *cited in Jenkins v.*

[4] The State invites this court to review its position that juvenile adjudications implicate double jeopardy principles. *See D.B. v. State*, 842 N.E.2d 399, 403 (Ind. Ct. App. 2006) ("We decline the State's apparent invitation to hold a juvenile adjudication can never implicate double jeopardy."). We again decline that invitation.

State, 695 N.E.2d 158 (Ind. Ct. App. 1998) (finding double jeopardy principles prevented defendant's conviction for both robbery and carjacking of same vehicle, notwithstanding fact that robbery information also named the victim's purse). The State does not dispute that only a single larceny is at issue here. Accordingly, we vacate D.R.'s true finding for attempted carjacking and remand to the trial court with instructions to amend D.R.'s dispositional order to reflect a true finding for attempted robbery only. *See Richardson*, 717 N.E.2d at 54 (concluding that reviewing court may remedy double jeopardy violation by vacating one of the convictions causing the violation).

The judgment of the juvenile court is affirmed in part and reversed and remanded in part.

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