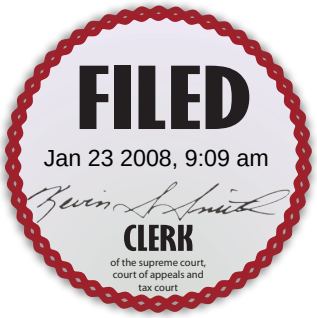

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IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER F. NELSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0705-CR-247
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Frances C. Gull, Judge
Cause No. 02D04-0612-FA-77

January 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Christopher F. Nelson appeals his conviction of robbery,[1] as a class B felony.

We affirm.

ISSUES

1. Whether the trial court committed reversible error when it allowed the State to reopen its case after it had rested.

2. Whether the trial court erred when it instructed the jury on accomplice liability.

3. Whether sufficient evidence supports the conviction.

FACTS

On the evening of December 18, 2006, James Martz was in his residence on Spring Street in Fort Wayne. His friend Justin Taritas was visiting him. Shortly before 6:00 p.m., Martz received a telephone call from Tyrell Morris. The call was made on Nelson's phone; Martz knew Nelson and recognized his number. Morris asked if Martz was at home. Martz indicated that he was not home and continued eating his dinner. Within minutes, Morris "opened the door like he lived there and walked in," looking surprised when he saw Martz. (Tr. 141). Morris called to Nelson to come inside, and he did. Martz had not invited the men to enter his residence.

Morris walked directly to Martz and "grabbed" Martz's cell phone "out of [his] hand." (Tr. 146). Morris then "kicked" Martz on the side of his head several times,

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[1] Nelson was also charged with one count of resisting arrest, a class A misdemeanor. At trial, his counsel conceded Nelson's guilt on that count. ("Mr. Nelson is guilty of Count III, Resisting Law Enforcement," Tr. 89, opening statement; and "write down guilty on Count III," Tr. 329, closing statement). The jury found Nelson guilty of resisting law enforcement, a class A misdemeanor, but he presents no challenge to his conviction of that offense.

pulled down his pants, rifled his pockets, and took the $40 inside. (Tr. 142). While Morris was beating Martz, Nelson positioned himself by standing in front of and facing Taritas, who was seated on the couch. Nelson and Morris departed – taking with them not only Martz's cell phone and his $40.00 but also Taritas' cell phone, which had been on top of the television.

The police were called, and officers responded. While the officers were at Martz's house, his brother Eugene Martz arrived. Eugene called Martz's cell phone on his cell phone and talked with "whoever took [Martz's] phone" using the speaker-phone feature, whereby the police officers could hear the conversation. (Tr. 108). A demand for $50.00 was made for the return of Martz's phone. In coordination with the police, Eugene arranged for a meeting place to make the exchange.

At the arranged meeting place, Nelson and Morris arrived in a car driven by Nelson. Another person in the car got out and approached Eugene and asked for the money in exchange for the cell phone, and police proceeded to arrest both Nelson and Morris. After Nelson was handcuffed, he attempted to flee but was quickly captured. The cell phones belonging to Martz and Taritas were found under the driver's side front seat of the car that Nelson had been driving.

The State charged Nelson with burglary, a class A felony; robbery, a class B felony; and resisting law enforcement, a class A misdemeanor. A jury trial began on April 11, 2007.[2] Martz testified, as reflected above. Taritas also testified. Officers

[2] Morris was a codefendant at the trial, having also been charged with burglary, as a class A felony, and robbery, as a class B felony.

Lichtsinn and Dubose testified that they were able to hear the conversation with Eugene on the cell phone, and that the $50 was to be paid not only for the return of Martz's cell phone but also for protection against such a robbery occurring in the future. Detective Dubose also testified that after Nelson and Morris were apprehended at the meeting site, Martz had identified the two as the men "who went into his house" earlier and "kicked him and took his cell phone and his money." (Tr. 218, 219). Dubose further testified that Martz reported to him that "both" Nelson and Morris had kicked him "four or five times." (Tr. 223). Late on April 11th, the State rested. The defense also rested.

The trial court held a conference on jury instructions. It denied the State's request for an instruction on accomplice liability, holding that Nelson had been charged as a principal. It later specified the lack of "evidence in the record to support the giving of an aiding instruction." (Tr. 271).

On the morning of April 12th, the State asked permission to reopen its case, advising that a listed witness had not appeared the day before but was now present. The trial court permitted the State to do so, overruling Nelson's objection and noting that Indiana law provided the trial court with authority in that regard. The trial court also stated that the defense could present rebuttal, if it chose.

Rachel Goodmann then testified that she had been in the vehicle driven by Nelson to the meeting site where Morris and Nelson were apprehended. She testified that both Morris and Nelson had talked on the cell phone during the conversation that arranged for the payment of money at the meeting. After Goodmann's testimony, the trial court found that "there [wa]s evidence . . . to support giving the aiding instruction," inasmuch as

Goodmann "clearly said they," that "[t]hey were on the phone." (Tr. 292, 293). The trial court ruled that it would instruct the jury on accomplice liability.

Morris then took the stand. He testified that during pretrial incarceration, he had witnessed Nelson make two or three telephone calls to his brother, asking the brother to take action to threaten and intimidate Martz and Taritas about their testimony at trial.

The jury found Nelson not guilty of the offense of burglary, but found him guilty of robbery and resisting law enforcement.

DECISION

1. Reopening of the State's Case

Nelson argues that the trial court abused its discretion when it allowed the State to reopen its case and present Goodmann as a witness. We disagree.

Indiana Code section 35-37-2-2(3) provides that after the State and the defense respectively have presented their evidence, only rebuttal evidence shall be offered "unless the court, for good reason and in furtherance of justice, permits [the parties] to offer evidence upon their original case." The granting of permission to reopen a case is within the discretion of the trial court, and the decision will be reviewed only to determine whether there has been an abuse of that discretion. *Ford v. State*, 523 N.E.2d 742, 745 (Ind. 1988). *Ford* articulates "factors which weigh in the exercise of discretion" in this matter as follows:

> whether there is any prejudice to the opposing party, whether the party seeking to reopen appears to have rested inadvertently or purposely, the stage of proceedings at which the request is made, and whether any real confusion or inconvenience would result from granting the request.

Ford, 523 N.E.2d at 745-46. *Ford* further states that two conditions

> must be shown to exist to justify a court of appellate jurisdiction in setting aside a ruling made by a trial court in the exercise of judicial discretion: 1) the action complained of must have been unreasonable in light of all attendant circumstances or it must have been clearly untenable or unreasonable; and 2) the action was prejudicial to the right of the complaining party.

523 N.E.2d at 746.

However, common law has also held, consistent with the statutory provision, that a party should be afforded the opportunity to reopen its case to submit evidence that would have been a proper part of its case-in-chief. *Ford*, 523 N.E.2d at 746; *Gorman v. State*, 463 N.E.2d 254, 255 (Ind. 1984); *Lewis v. State*, 406 N.E.2d 1226, 1230 (Ind. Ct. App. 1980). Further echoing the provisions of the statute, common law allows for the reopening of a party's case because "a trial is not a game of technicalities, but one in which the facts and truth are sought." *King v. State*, 531 N.E.2d 1154, 1161-62 (Ind. 1988); *Ford*, 523 N.E.2d at 756; and *Lewis*, 406 N.E.2d at 1231 (all quoting *Eskridge v. State*, 258 Ind. 363, 281 N.E.2d 490, 493 (1972)).

Goodmann's testimony had been planned as part of the State's case-in-chief, and she had been listed as a witness, but her confusion about the date resulted in her appearing a day late. Before trial, Nelson had been apprised by the State of what it believed Goodmann's testimony would be. There is no argument that her testimony would not have been a proper part of the State's evidence presentation.

Nelson argues that her last-minute testimony, after both parties had rested, unduly emphasized its substance. In *Gorman*, the appellant made a similar argument. Although

noting that the situation posed "the potential for abuse," our Supreme Court did "not find abuse," noting that the witness "was not a surprise witness," and the appellant had been "given the opportunity to cross-examine the witness and to call additional witnesses in his behalf." 463 N.E.2d at 257. Goodmann was not a surprise witness; Nelson was able to cross-examine her at trial; and the trial court offered Nelson the opportunity to present further evidence on his own behalf.

We do not find that permitting Goodmann to testify was either "unreasonable in light of all attendant circumstances," or "clearly untenable or unreasonable." *Ford*, 523 N.E.2d at 746. Therefore, we conclude that the trial court did not abuse its discretion when it allowed the State to reopen its presentation of evidence.

2. Accomplice Liability Instruction

Nelson argues that the trial court erred in instructing the jury that "a person who knowing or intentionally aids, induces, or causes another person to commit an offense commits that offense." (App. 13). Specifically, he asserts that "before Goodman[n]'s testimony, there was nothing in the record to support" an instruction based on the "theory that Nelson had aided or assisted Morris in the commission of a robbery," and that her testimony "didn't make it any better for the State." Nelson's Br. at 10. We cannot agree.

Instructing the jury is a matter entrusted to the discretion of the trial court. *Ham v. State*, 826 N.E.2d 640, 641 (Ind. 2005). We review the trial court's instruction of the jury for an abuse of that discretion. *Overstreet v. State*, 783 N.E.2d 1140, 1163-64 (Ind. 2003), *cert. denied* 540 U.S. 1150. The trial court "may not accept a tendered instruction unless it correctly states the law, is supported by evidence in the record, and is not

covered by other instructions. *Lambert v. State*, 743 N.E.2d 719, 739 (Ind. 2001), *cert. denied* 534 U.S. 1136. Thus, parties "are not entitled to an instruction that is not supported by the evidence." *Id.*

Accomplice liability is not established as a separate crime, but merely a separate basis of liability for the crime charged. *Hampton v. State*, 719 N.E.2d 803, 807 (Ind. 1999). To be convicted of a crime based on the theory of accomplice liability, it is not necessary that the defendant participate in every element of that crime. *Ransom v. State*, 850 N.E.2d 491, 496 (Ind. Ct. App. 2006). In determining whether a person aided or was an accomplice to another in the commission of a crime, our Supreme Court has long considered the following four factors:

> (1) presence at the scene of the crime; (2) companionship with another engaged in criminal activity; (3) failure to oppose the crime; and (4) a defendant's conduct before, during, and after the occurrence of the crime.

Garland v. State, 788 N.E.2d 425, 431 (Ind. 2003). Where the facts raise a reasonable inference that the crime was carried out through an accomplice, it is appropriate for the trial court to give an accomplice liability instruction. *Hampton*, 719 N.E.2d at 807.

The evidence shows that Martz received a call from a man using "[Nelson]'s phone," and that the caller inquired whether Martz was home. Within minutes of Martz's responsive statement that he was not home, Morris entered Martz's residence and looked surprised to see him there. Nelson entered behind Morris, although neither man was invited inside. Morris began kicking Martz and took his cell phone, while Nelson positioned himself in front of the other occupant of Martz's living room – Taritas. Nelson and Morris departed together, taking Martz's money and the cell phones of Martz

and Taritas. Shortly thereafter, Martz's brother engaged a man on Martz's cell phone in a conversation about obtaining the return of that phone. The speaker advised that a payment of $50 was necessary for return of the phone and "protection," and this conversation was overheard by police officers. Arrangements coordinated with the police were made to pay the money demanded at a specific meeting site. Nelson drove himself and Morris to the meeting site. After an occupant of the vehicle got out to collect the payment, Nelson and Morris were arrested. Both stolen cell phones were found under the driver's seat of the vehicle Nelson had been driving.

The foregoing evidence, given before Goodmann's testimony was heard, was sufficient to support the giving of an accessory liability instruction. Morris' use of Nelson's phone to call Martz and inquire about his whereabouts, only minutes before Morris and Nelson entered Martz's residence, supports the reasonable inference that the twosome planned the attack on Martz. Further, Nelson's positioning of himself during the attack supports the reasonable inference that he was aiding in the attack by preventing any assistance to Martz by Taritas. Finally, the facts that (1) Nelson drove the twosome to the meeting to collect payment for the stolen cell phone and Martz's future protection, and (2) the stolen cell phones were recovered from beneath Nelson's seat in the vehicle, support the reasonable inference that Nelson was a participant in the robbery. Subsequently, Goodmann's testimony that as the car was being driven by Nelson to the meeting site, both Nelson and Morris were engaged in the conversation arranging for payment was additional evidence to support the reasonable inference that Nelson was acting as an accomplice.

Sufficient evidence supports the giving of an instruction on the theory of accomplice liability. Therefore, the trial court did not abuse its discretion in so instructing the jury.

3. Sufficiency of the Evidence

The standard of review we apply when considering an appellant's claim that the conviction is not supported by sufficient evidence has been recently summarized by Indiana's Supreme Court as follows:

> When reviewing the sufficiency of the evidence to support the conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder *could* find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted, emphasis in original).

Finally, Nelson argues that the evidence is insufficient to support his conviction for robbery because there is no "affirmative conduct on the part of Nelson," "nothing that Nelson did or said that would provide any reasonable inference that he was aiding or assisting Morris in taking" the cell phones or the money from Martz. Nelson's Br. at 8. Again, we cannot agree.

"One who knowingly or intentionally takes property from another by using force or putting that person in fear commits robbery." If the act "results in bodily injury to any person other than a defendant," the offense is a class B felony. Ind. Code § 35-42-5-1. Further, one "who knowingly or intentionally aids, induces or causes another person to commit an offense commits that offense." I.C. § 35-41-2-4.

As Nelson correctly notes, there must be "some form of concerted action or participation by the defendant" to convict on the accomplice liability theory. *Id.* (citing *Moore v. State*, 697 N.E.2d 1268 (Ind. 1988)). As recounted in the previous section, the call inquiring of Martz's whereabouts was made by Morris on Nelson's phone. Further, while Morris was kicking Martz, Nelson positioned himself in such a way as to deter Taritas from going to his aid. Nelson participated in the call that demanded the payment for the return of Martz's cell phone and protection against future robberies. Nelson drove the twosome to the meeting site for the payment arranged. Finally, the two stolen cell phone were recovered from beneath Nelson's seat in the vehicle he drove. All of the foregoing is evidence of concerted action or participation by Nelson with Morris.

Sufficient probative evidence supports the jury's conclusion that the State proved beyond a reasonable doubt that Nelson committed the offense of robbery in the beating of Martz and the taking of money and his cell phone from him.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.