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IN THE
COURT OF APPEALS OF INDIANA

CORY SALINAS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0603-CR-208
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Randy Williams, Judge Pro Tem
Cause No. 79D01-0507-FA-22

December 19, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Cory M. Salinas appeals following a jury trial in which he was convicted of robbery resulting in serious bodily injury, a Class A felony.[1] Salinas raises the following issues, which we restate as: (1) whether sufficient evidence supports Salinas's conviction for robbery resulting in serious bodily injury; (2) whether the trial court properly sentenced Salinas; and (3) whether Salinas's sentence is inappropriate given the nature of the offense and his character. We reverse, concluding that insufficient evidence exists to support Salinas's conviction for robbery resulting in serious bodily injury. Therefore, we do not reach Salinas's arguments regarding sentencing.

Facts and Procedural History

The facts most favorable to the decision below are that on June 10, 2005, Salinas, his girlfriend, Nicole Sivits, Matthew Poisel, and Poisel's girlfriend, Denise Leazenby, traveled from Logansport, Indiana, to Lafayette, Indiana. The group stayed at the residence of Susan Williams, Salinas's mother. On June 11, 2005, while their girlfriends were working at Filly's Gentlemen's Club, Salinas and Poisel crossed the pedestrian bridge from Lafayette to West Lafayette. On their way, they met two local lawyers, Jason Cottrell and Dan Moore. Salinas and Poisel asked the lawyers if there were any strip clubs in West Lafayette. Cottrell and Moore said that none existed, but directed Salinas and Poisel to the Neon Cactus, a nightclub in the area. As Cottrell and Moore walked away, either Salinas or Poisel asked whether the Neon Cactus had a cover charge. Cottrell replied that there was a five-dollar cover charge.

Either Salinas or Poisel then asked the other whether he had money for the cover charge, and then said that even if they did not have money they could rob or "jack" someone for it. Id. at 478. Poisel and Salinas continued toward the Neon Cactus. As they approached the club, they came across Brian Clawson, who was standing at an ATM, and Poisel suggested that they rob Clawson. Salinas testified that he told Poisel that they should not commit the robbery. Poisel approached Clawson, asked him for his money, and when Clawson refused, shot him in the back. Poisel took Clawson's wallet and fifty dollars that Clawson had withdrawn from the ATM, and handed the wallet to Salinas.[2] After being shot, Clawson managed to crawl out to a parking lot, where a passer-by saw him and summoned assistance. As a result of the gunshot wound, Clawson was hospitalized for roughly six weeks.

Salinas testified that after the shooting, he ran back to his mother's residence, where Poisel joined him. The two then called a cab, and went to Filly's to meet their girlfriends. While at Filly's, Poisel and Salinas played pool and drank beer. When the four left Filly's around three a.m., they went to Steak n' Shake and then to Salinas's mother's residence, where they spent the night. In the morning, Sivits told Leazenby that Poisel had shot someone the night before. Before leaving Salinas's mother's residence, Poisel hid a gun not used in the shooting in a flowerpot. Salinas testified that he later found another gun under his mother's couch. Salinas thought that this gun was the one with which Poisel shot Clawson.

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[1] The jury also found Salinas guilty of robbery, a Class B felony, and theft, a Class D felony. The trial court correctly did not enter judgment on these convictions. Appellant's Appendix at 7.

[2] Salinas testified that Poisel never handed him the wallet. However, a police interview transcript, which was introduced into evidence, indicates that an officer asked Salinas, "What'd Matt do when he took out [Clawson's] wallet?" Salinas responded "I don't know. That's the thing. I, Matt went through it after …, he handed it to me. I'm way over here. It's kind of hard to fuckin' see." Id. at 733.

Salinas gave this gun to a friend, who took the gun to Logansport. Police eventually recovered this gun and determined it was the one with which Clawson was shot.

Salinas was charged with robbery resulting in serious bodily injury, robbery, conspiracy to commit robbery, and theft. The State did not attempt to show that Salinas was the actual shooter, but proceeded on the theory of accomplice liability. A jury found Salinas innocent of conspiracy to commit robbery, but guilty of robbery resulting in serious bodily injury, robbery, and theft. The trial court entered a judgment of conviction for robbery resulting in serious bodily injury and sentenced Salinas to thirty-two years, with six years suspended, four of those to be executed on community corrections, and two on supervised probation. At the sentencing hearing, the trial court discussed (1) the nature and circumstances of the crime, (2) Salinas's criminal history, (3) Clawson's recommendation that Salinas receive the maximum sentence, (4) the fact that Salinas's involvement in the crime was less than that of Poisel, (5) Salinas's youth, and (6) his family support.[3] Salinas now appeals both his conviction and sentence. Additional facts will be included as needed.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses' credibility. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). We

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[3] The court did not use the terms "aggravators" or "mitigators" when discussing these terms, and did not set out aggravators or mitigators in the sentencing order. However, the order states, "[t]he Court finds the aggravating factors outweigh the mitigating factors." Id. at 4.

will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. Id.

B. Sufficiency of the Evidence for Accomplice Liability

The State tried Salinas on a basis of accomplice liability, under which "[a] person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense." Ind. Code § 35-41-2-4. The accomplice is as guilty as one who actually commits any criminal act that is "a probable and natural consequence of their concerted action." Berry v. State, 819 N.E.2d 443, 450 (Ind. Ct. App. 2004), trans. denied. To be guilty as an accomplice, it is not necessary that the defendant participate in each element of the crime. Id. "There is no bright line rule in determining accomplice liability; the particular facts and circumstances of each case determine whether a person was an accomplice." Vitek v. State, 750 N.E.2d 346, 353 (Ind. 2001). However, when determining accomplice liability, Indiana courts generally examine 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). Although they may be considered as evidence of accomplice liability, mere presence at the scene and failure to oppose the commission of the crime are insufficient to support a conviction under such a theory. Turner v. State, 755 N.E.2d 194, 198 (Ind. Ct. App. 2001), trans. denied. Instead, evidence must exist of "the defendant's affirmative conduct, either in the form of acts or words, from which an inference of common design or purpose to effect

the commission of a crime may be reasonably drawn." Id.

Although appellate review of sufficiency of the evidence will turn on the specific facts of the case at hand, we find the facts of our supreme court's decision in Garland extremely relevant to our present review. In Garland, the defendant had been aware for weeks that a third party, Lloyd, planned to kill the defendant's father. The defendant and Lloyd had discussed this plan on several occasions, and the defendant had indicated his reluctance to have any part in the killing. However, the defendant neither warned his father nor reported Lloyd's intentions to the police. One night, Lloyd came to the defendant's house and stood on the porch talking to the defendant's mother. Eventually, the defendant's father sent the defendant outside to see what Lloyd was doing. When the defendant went outside, he saw Lloyd with a gun, and Lloyd told him to stay outside if he did not want to participate in the killing. Lloyd then entered the house and killed the defendant's father. The defendant helped his mother and Lloyd leave the scene and conceal evidence of the crime. The defendant did not report the murder to the police, and when questioned by police about the killing, the defendant denied any knowledge. A jury found the defendant guilty of murder under a theory of accomplice liability. Our supreme court reversed, and indicated that its decision "substantially results from the absence of evidence demonstrating that the defendant took any step to aid, induce, or cause the crime, even though the defendant may have known that Lloyd intended to commit murder, and took no action to prevent it." 719 N.E.2d at 1242.

Similarly, in this case, we find no evidence that Salinas took any affirmative step to aid, induce, or cause Poisel to rob Clawson. The State points to the following evidence in

arguing that sufficient evidence exists: (1) Poisel handed Clawson's wallet to Salinas after the robbery;[4] (2) Salinas was present at the scene at the shooting; (3) Salinas stayed with Poisel the remainder of the night; (4) Salinas helped dispose of the weapon; (5) Salinas was present two days before the shooting when Leazenby bought ammunition; (6) Salinas knew that Poisel had a gun; (7) Cottrell and Moore testified that either Poisel or Salinas said something about robbing someone.

The majority of this evidence is remarkably similar to the evidence found insufficient in Garland. Salinas, like the defendant in Garland, was present at the crime scene, knew that the shooter had a gun, failed to help the victim, concealed evidence, and remained in the company of the shooter after the crime. In fact, the evidence in Garland shows a stronger nexus between the defendant and the shooting than does the evidence in this case. The defendant in Garland had known for weeks that Lloyd planned to commit a specific crime, the murder of the defendant's father, and had been solicited several times to assist in the crime. No substantial evidence indicates that Salinas actually knew Poisel planned to commit any robbery, much less the robbery of Clawson resulting in serious bodily injury, until shortly before Poisel actually approached Clawson at the ATM.

Salinas's mere presence at Wal-Mart when Leazenby bought ammunition for Poisel two days before the robbery hardly constitutes an affirmative act, much less an act that aided, induced, or caused Poisel to rob Clawson. The evidence introduced shows merely that

[4] As indicated above, supra, note 3, the statement relied upon by the State in asserting that Poisel handed Salinas the wallet is ambiguous. However, given our standard of review, we assume that Poisel actually did hand the wallet to Salinas.

Salinas knew that the purchase took place, and in no way indicates that Salinas played any role in the decision to purchase ammunition. Thus, this evidence is basically cumulative of other evidence indicating that Salinas knew Poisel had a gun.

The two pieces of evidence that arguably distinguish this case from Garland are: (1) the comment made by either Salinas or Poisel regarding robbing someone in order to pay the cover charge; and (2) the fact that Poisel handed Salinas the wallet after shooting Clawson. We will discuss each in turn.

In regard to the comment, a reasonable fact-finder could have determined that either Poisel or Salinas made the comment. Salinas testified that Poisel made the comment. Cottrell testified that he was unsure who made the comment, but based on the voice he heard, he "made the deduction that it was [Salinas]." App. at 69. Moore also testified that he was unsure who made the comment, but that his "best guess would be [Poisel] was the person that made the statement." Id. at 481. Assuming Poisel made the statement, mere knowledge that another plans to commit a criminal act an insufficient basis to establish accomplice liability. Garland, 719 N.E.2d at 1242.

Assuming Salinas made the statement, we conclude that this comment is insufficient to establish accomplice liability. While one may become an accomplice through the use of words, he must use the words so that he knowingly aids, induces, or causes the principal to act. Ind. Code § 35-41-2-4; B.K.C. v. State, 781 N.E.2d 1157, 1164 (Ind. Ct. App. 2003). Moore testified that one individual asked the other if he had money for cover; the other responded that he did; and the first individual said "something to the effect of, if you didn't, we could just jack somebody." App. at 478. Cottrell testified that one individual "said to the

other, 'Do you have the five dollars,' and before the other could answer, he goes, 'Aw, don't worry about it. If you don't have it, we can rob someone.'" Id. at 167. Cottrell, Moore, and Salinas all testified that the comment was not made in a serious manner. Id. at 167 (Cottrell testified that "when they made the comment about the robbery, no, I did not take them seriously"); id. at 481 (Moore testified that he interpreted the comment about robbing someone "as being more for, for [Moore and Cottrell's] benefit than anything else . . . just bravado trash talk that, you know, sounding tough"); id. at 549 (Salinas testified that at the point Poisel made the comment, he "took it as a joke"). This comment, though far from humorous in retrospect, appeared to all those present to be nothing more than flippant boasting, and does not provide substantial evidence of probative value that Salinas knowingly induced Poisel to rob Clawson.

The fact that Poisel handed Clawson's wallet to Salinas after the robbery also fails to show any knowing aid, inducement, or causation by Salinas. Sharing in the proceeds of a crime may be considered as circumstantial evidence of participation in the crime. See Vitek, 750 N.E.2d at 353. However, no evidence was presented that Salinas actually shared in the proceeds. The only evidence indicating that Salinas ever possessed the wallet is his ambiguous statement given to police, and while this statement may provide a basis from which a reasonable trier of fact could conclude that Poisel handed Salinas the wallet, it provides an insufficient basis from which a reasonable trier of fact could conclude that Salinas shared in the proceeds of the robbery. Moreover, even assuming that Salinas did take

money from the wallet that Poisel handed him,[5] this evidence still does not show any affirmative act that caused, aided, or induced Poisel to commit the robbery. At most, this evidence may support a finding that Salinas knowingly received stolen property.[6] See Ind. Code 35-42-4-2(b); cf. Murphy v. State, 499 N.E.2d 1077, 1080 (Ind. 1986) (recognizing that "the jury could have accepted portions of the inconsistent testimony . . . and concluded that [the defendant] was not a participant in the robbery but that he did share in the proceeds. Consequently, while there was evidence to support [a] conviction [for robbery], the jury concluded that the State met its burden of proof on only [receiving stolen property]"); Smith v. State, 229 Ind. 546, 550-51, 99 N.E.2d 417, 419 (Ind. 1951) ("From the fact that appellant received part of the proceeds of the robbery, it would not necessarily follow that he was an accessory after the fact of armed robbery.").

Although we certainly do not condone Salinas's conduct,[7] we cannot say that a reasonable trier of fact could have concluded that he committed the crime of robbery resulting in serious bodily injury. The evidence was simply insufficient to support the

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[5] Clawson testified that he had no money in his wallet when he went to the ATM. App. at 155.

[6] The State did not charge Salinas with receiving stolen property, but instead charged him under the theft section of Indiana Code section 35-43-4-2, requiring it to prove Salinas acted with the intent to deprive Clawson of the value of his money.

[7] In Garland, although our supreme court reversed the defendant's murder conviction, it remanded with instructions that the trial court enter judgment for assisting a criminal, a crime of which the jury had found the defendant guilty, but that had been vacated by the trial court on double jeopardy grounds. 719 N.E.2d at 1242. The court held that the evidence of the defendant's actions after the commission of the crime were sufficient to support a finding that the defendant had "harbored, concealed, or otherwise assisted Lloyd with the intent to hinder his apprehension or punishment after Lloyd had committed the crime." Id. We would do the same in this case, except the State did not charge Salinas with assisting a criminal, and for the same reasons the evidence is insufficient to support a conviction of robbery resulting in serious bodily injury, the evidence is insufficient to support convictions for robbery or theft.

conclusion that he knowingly aided, induced, or caused Poisel to rob Clawson.

Conclusion

We hold that insufficient evidence exists to support a conclusion that Salinas knowingly aided, induced, or caused Poisel to commit robbery.

Reversed.

SULLIVAN, J., and BARNES, J., concur.