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**IN THE
COURT OF APPEALS OF INDIANA**

ERIC D. CURTIS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 71A05-0601-CR-23

APPEAL FROM THE ST. JOSEPH SUEPRIOR COURT
The Honorable R. W. Chamblee, Judge
Cause No.71D08-0410-CF-357

September 19, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Eric D. Curtis appeals his conviction for burglary as a Class C felony, claiming that the trial court erred in instructing the jury. We conclude that the trial court did not abuse its discretion in giving instructions that allowed the jury to find Curtis guilty without reaching a unanimous verdict as to whether Curtis acted as a principal or an accomplice. Therefore, we affirm Curtis's conviction.

Facts and Procedural History

During the early morning hours of October 1, 2004, Captain Kirby Stoner ("Captain Stoner") of the Mishawaka Police Department observed a maroon van backed up to the steel door of an Audio Exchange store. The emergency exit of the building was open. As Captain Stoner approached, the driver's door closed and the van moved out onto the street with its headlights off. Captain Stoner saw at least two people in the van. He turned on his emergency lights and followed the van at speeds up to eighty miles per hour. Police employed stop sticks at the county line, which deflated the van's tires, but the van continued to drive on its rims. The occupants of the van then began throwing boxes of stereo equipment from the vehicle. Eventually, the van slid off the road and collided with a house. Two men exited through the sliding door on the passenger side of the van and started running. Captain Stoner caught up with these two men and held them at gunpoint until other officers arrived to assist him.

Mishawaka Police Officer Steve Roeder ("Officer Roeder"), who was also present at the scene, saw a third man, later identified as Curtis, in the driver's seat of the van. Both Officer Roeder and Patrolman Daniel Bodle ("Patrolman Bodle") saw Curtis exit

the van through the front passenger door. Patrolman Bodle caught Curtis and took him into custody. Further investigation at Audio Exchange revealed that the store's door had been pried open, a glass showcase inside the business had been shattered, and pieces of merchandise had been taken. The store's owner identified stereo and home theatre equipment collected along the route traveled by the van and from the van as belonging to Audio Exchange.

The State charged Curtis with burglary as a Class C felony.¹ The charging information provided, in pertinent part:

On or about the 1st day of October 2004, in St. Joseph County, State of Indiana ERIC D. CURTIS did knowingly break and enter the building or structure of Audio Exchange located at 3509 Grape Road, Mishawaka, St. Joseph County, Indiana, with the intent to commit a felony therein, to-wit: theft, that is knowingly exerting unauthorized control over the property of another person with intent to deprive that person of any part of the value or use thereof.

Appellant's App. p. 5.

The cause proceeded to a jury trial. After the presentation of evidence, the State tendered two jury instructions. State's Instruction 1 provided:

To convict the Defendant of Burglary, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant, Eric Curtis
2. Did knowingly
3. Break and enter
4. A building or structure, namely the Audio Exchange store located at 3509 Grape Road in Mishawaka, Indiana
5. With intent to commit a felony inside, namely theft, which is knowingly exerting unauthorized control over the property of another person with the intent to deprive that person of any part of that property's value or use.

¹ Ind. Code § 35-43-2-1.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty.

If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of Burglary, a Class C felony, as charged.

Id. at 36. State's Instruction 2 provided:

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.

The acts of one person are attributable to all who are knowingly or intentionally acting together during the commission of a crime. Accordingly, although the State need not prove, beyond a reasonable doubt, that the defendant personally, and acting by himself, committed all of the elements of the crime with which he is charged, the State must prove, beyond a reasonable doubt, that the defendant engaged in some affirmative conduct aiding, inducing, or causing another person to commit the charged offense, and that the defendant and another person or persons, knowingly or intentionally acting together, committed all of the elements of the crime with which the defendant is charged.

Id. at 37. Curtis objected to State's Instruction 2, arguing in part that the jury should not be instructed on accomplice liability because he was never charged as an accomplice. *See* Tr. p. 278-82. The trial court overruled the objection and gave the jury both of the State's tendered instructions. The trial court also instructed the jury, "Your verdict must be unanimous." Appellant's App. p. 41. The jury returned a general verdict of guilty, and the trial court sentenced Curtis to an executed prison term of four years with credit for time served. With permission from the trial court, Curtis brings this belated appeal.

Discussion and Decision

On appeal, Curtis argues that the trial court erred in instructing the jury. The manner of instructing a jury lies largely within the discretion of the trial court, and we will reverse only for abuse of discretion. *Mayes v. State*, 744 N.E.2d 390, 394 (Ind. 2001). To constitute an abuse of discretion, the instruction given must be erroneous, and the instructions taken as a whole must misstate the law or otherwise mislead the jury. *Id.*

Here, Curtis claims that there is no way of knowing whether the jury reached a unanimous verdict because the State pursued two theories of guilt—principal liability and accomplice liability—but the trial court’s instructions did not require the jurors to agree unanimously on whether Curtis acted as a principal or as an accomplice. He acknowledges the Indiana Supreme Court’s recent holding in *Taylor v. State* that “while jury unanimity is required as to the defendant’s guilt, it is not required as to the theory of the defendant’s culpability.” 840 N.E.2d 324, 333 (Ind. 2006). Nonetheless, Curtis contends that jury unanimity *is* required as to the theory of the defendant’s culpability when there is no evidence of what role each person played in the burglary. We must disagree.

As cited in *Taylor*, the California Supreme Court stated in *California v. Jenkins*, a murder case:

It is settled that as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator.

* * * *

Sometimes, as probably occurred here, the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a

reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, *but no such doubt that he was one or the other.*

997 P.2d 1044, 1130 (Cal. 2000) (emphases added); *see also Taylor*, 840 N.E.2d at 334.

In this case, as Curtis stresses, there is no evidence of who did what during the actual burglary. Therefore, there may be a reasonable doubt that Curtis was the direct perpetrator and a similar doubt that he was the aider and abettor. However, there is no such doubt that he was one or the other. Indeed, Curtis admits several times in his brief that “the State adduced sufficient evidence to convict” on the accomplice liability theory. Appellant’s Br. p. 1, 5-6. In Indiana, there is no distinction between the responsibility of a principal and an accomplice. *Taylor*, 840 N.E.2d at 338. The trial court did not abuse its discretion in instructing the jury.

Affirmed.

BAKER, J., and CRONE, J., concur.