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**IN THE
COURT OF APPEALS OF INDIANA**

OTIS ALLEN TATE, JR.,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 71A03-1009-CR-529

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland Chamblee, Jr., Judge
Cause No. 71D01-0906-FB-63

May 25, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Otis Tate, Jr., appeals his conviction for Class B felony burglary. We affirm.

Issues

Tate raises two issues, which we restate as:

- I. whether there is sufficient evidence to support his burglary conviction; and
- II. whether the trial court properly denied his request for surrebuttal during final arguments.

Facts

On the afternoon of June 8, 2009, Brittany Powers drove Tate in her blue Chevy Caprice to pick up Willie and Wayne Hoskins. While in the car, Willie explained his plan to break into George Rogers's apartment in South Bend with Tate and Wayne, steal items, sell the stolen property, and split the proceeds three ways. At around 3:30 p.m., Larry Pittman, Rogers's neighbor, was sitting on his couch when he saw three men walk across his patio. Pittman heard the men walk upstairs, kick in a door, ransack the apartment, and come back downstairs. Pittman saw the men run back across the patio with "shoes, computers and a bunch of other stuff." Tr. p. 38. Pittman called the police from his cell phone and ran after them. As he was talking to the police, he saw the men run to a blue Chevy Impala¹ and tell the female driver to meet them around the corner. Pittman watched as the men threw stuff into the bushes and eventually got into the car.

¹ Tate does not challenge Pittman's testimony that it was an Impala. All other evidence indicates the car was a Caprice.

Pittman followed the car in his own car and then returned to his apartment, where he met the police.

Shortly thereafter, Officer Paul Strabavy of the South Bend Police Department saw a car matching Pittman's description of a blue Chevy Caprice with three black male passengers and "light skinned black female" driver and conducted a traffic stop. *Id.* at 39. Some of Rogers's property was found inside the car, and Pittman identified Tate at the scene of the stop as one of the men he had seen outside his apartment that afternoon. Other property belonging to Rogers was found on the ground near the edge of the woods near Rogers's apartment.

The State charged Tate with Class B felony burglary. A jury found Tate guilty as charged. Tate now appeals

Analysis

I. Sufficiency of the Evidence

Tate argues there is insufficient evidence to support his conviction. The standard of review for claims of insufficient evidence is well settled. We do not reweigh the evidence or judge the credibility of the witnesses, and we respect the jury's exclusive province to weigh conflicting evidence. *Jackson v. State*, 925 N.E.2d 369, 375 (Ind. 2010). We consider only the probative evidence and reasonable inferences supporting the verdict and affirm if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.*

The State charged Tate with Class B felony burglary, which occurs when a person breaks and enters the dwelling of another person with intent to commit a felony, in this case theft. See Ind. Code § 35-43-2-1(1)(B). Tate argues that the identification evidence was insufficient as a matter of law to support his conviction. Tate challenges eyewitness identifications generally, Pittman’s general description of the men to police, the manner in which Pittman identified Tate at the scene of the traffic stop, Pittman’s failure to identify Tate at trial, and the credibility of Willie’s and Wayne’s trial testimony.²

Although Pittman was not able to make an in-court identification of Tate, he testified that he was “[o]ne hundred percent positive” that the people he identified at the scene of the traffic stop were the same men he had seen outside of his apartment. Tr. p. 45. Contrary to Tate’s assertion, there was nothing equivocal about Pittman’s identification of him. Further, Willie and Wayne both testified that Tate was with them when they discussed the burglary, went to the apartment, and fled the scene, and it is undisputed that Tate was in the car when the traffic stop was conducted. Powers, the mother of Tate’s son, who testified on Tate’s behalf, even stated that Tate was with her at the apartment complex that afternoon but explained that they were only there to pick up Willie and Wayne.

The nature of Pittman’s identification of Tate and Willie’s and Wayne’s credibility were matters for the jury to assess and weigh accordingly. “Elements of offenses and identity may be established entirely by circumstantial evidence and logical inferences

² Tate does not challenge the admissibility of Pittman’s pre-trial identification of Tate on appeal. He only argues that the Pittman’s identification of him was insufficient as a matter of law to establish his identity.

drawn therefrom.” Bustamante v. State, 557 N.E.2d 1313, 1317 (Ind. 1990). Considering the evidence most favorable to the conviction, we must conclude that the State presented sufficient evidence to establish Tate’s identity.

Next, Tate concedes that he was at the apartment complex that day and that he was in the car stopped by the police. Pointing to Powers’s testimony, however, Tate argues that he was there to pick up Willie and Wayne, not to participate in the burglary. He contends there is insufficient evidence that he participated in the burglary.

In the charging information, the State cited Indiana Code Section 35-41-2-4, which provides, “A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense” The State argued the theory of accomplice liability to the jury. An accomplice can be held criminally liable for everything done by his or her confederates that is a probable and natural consequence of their common plan. Hauk v. State, 729 N.E.2d 994, 998 (Ind. 2000). “One can be charged as a principal and convicted on proof that he aided or abetted another in committing the crime.” Hoskins v. State, 441 N.E.2d 419, 425 (Ind. 1982). In determining whether a defendant aided another in the commission of the crime, we consider his or her: (1) presence at the scene of the crime; (2) companionship with another at the scene of the crime; (3) failure to oppose the commission of the crime; and (4) the course of conduct before, during, and after the occurrence of the crime. Kelly v. State, 719 N.E.2d 391, 396 (Ind. 1999). “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).

Willie and Wayne both testified that Tate was with Powers when she picked them up, that Willie explained his plan to burglarize and steal items from Rogers's apartment and split the proceeds three ways, and that Powers drove the three men to and from the apartment complex. Although it is unclear whether Tate actually kicked in the door or entered Rogers's apartment, Pittman testified that he saw the three men run across his patio, heard them upstairs in Rogers's apartment, and saw them fleeing with various items and driving away with Powers. Consistent with Pittman's testimony, Rogers's apartment door was kicked in, his apartment was ransacked, his shoes and laptop were found on the ground near the apartment complex, and his jewelry was found in Powers's car. Willie testified that he handed various items to Tate and that Tate threw them into the woods. To the extent that Tate questions the veracity of Willie's and Wayne's testimony, their credibility was a question for the jury to resolve. There is sufficient evidence to show that he was an accomplice in the burglary and not merely a companion of Willie and Wayne after the burglary.

II. Surrebuttal

Tate argues that the trial court improperly denied his request to make a surrebuttal during final arguments. He contends that the State "for the first time near the end of its rebuttal, specifically introduced accomplice liability as a theory by which the jury could convict Tate of the burglary" Appellant's Br. p. 14. Tate asserts that the denial of request for surrebuttal warrants a new trial.

Tate relies on Indiana Code Section 35-37-2-2(4), which describes the order of a criminal trial and provides in part:

When the evidence is concluded the prosecuting attorney and the defendant or his counsel may, by agreement in open court, submit the case to the court or jury trying the case, without argument. If the case is not submitted without argument, the prosecuting attorney shall have the opening and closing of the argument. However, the prosecuting attorney shall disclose in the opening all the points relied on in the case, and if in the closing he refers to any new point or fact not disclosed in the opening, the defendant or his counsel may reply to that point or fact, and that reply shall close the argument of the case. . . .

Similarly, Indiana Jury Rule 27, describing “final arguments,” explains in part:

If the parties argue the case to the jury, the party with the burden of going forward shall open and close the argument. The party which opens the argument must disclose in the opening all the points relied on in the case. If, in the closing, the party which closes refers to any new point or fact not disclosed in the opening, the adverse party has the right to reply to the new point or fact. The adverse party’s reply then closes the argument in the case.

Assuming this issue is properly preserved, we cannot agree with Tate that the State raised a new theory in its rebuttal. In its opening final argument the State asserted that the only issue was whether it was Tate who participated in the burglary. Specifically, the State argued, “The dispute comes down to whether or not this defendant was one of the three participants in that.” Tr. p. 286. In his argument, Tate argued that Pittman, Willie, and Wayne were not credible witnesses, leaving only Powers’s explanation that she and Tate were only there to pick up Willie and Wayne. The State argued in its rebuttal:

It is also true that we’ve got people who are on the lookout and, ladies and gentlemen, the instructions will tell you, we don’t have to prove any one action by any one person. We have to prove that it was done and that these people participated. So I don’t have to come in here with definitive proof saying [Tate] kicked in the door and Wayne was the lookout and Willie went in and grabbed this particular item and

that it was somebody else that three something into the woods. That's not what we have to prove. We have to prove that the elements were fulfilled and that these people were participants and that's what the instructions will tell you.

Tr. p. 315. This argument was within the scope of the other arguments—whether Tate participated in the burglary. Tate has not established that the trial court improperly denied him the opportunity to present a surrebuttal.

Even if the State's comments were not in response to Tate's final argument, to obtain a reversal on appeal, Tate must show that the error affected his substantial rights. See Jones v. State, 825 N.E.2d 926, 935 (Ind. Ct. App. 2005) (citing Ind. Trial Rule 61, which provides "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."), trans. denied. Tate offers no analysis of how the denial of his request for surrebuttal violated his substantial rights and our review of the record shows no such violation.

The issue of accomplice liability was before the jury throughout the trial. For example, the charging information specifically references the statute relating to accomplice liability. Further in the State's opening argument, the State argued, "Ladies and gentlemen, we talked a little bit about accomplice liability during jury selection and that's what the evidence is that you're going to hear is that these three men worked together to commit the burglary, and you are going to hear from both Wayne and Willie Hoskin." Tr. p. 10. Finally, both the State and Tate requested instructions on the issue of accomplice liability. See App. pp. 35, 45. Even if the State's rebuttal was outside the scope of Tate's final argument, because the State did not raise the theory of accomplice

liability for the first time in its rebuttal, Tate has not established that his substantial rights were violated. See Jones, 825 N.E.2d at 935.

Conclusion

There is sufficient evidence to support Tate's Class B felony burglary conviction. Further, Tate has not established that the denial of his request to make a surrebuttal warrants a new trial. We affirm.

Affirmed.

RILEY, J., and DARDEN, J., concur.