

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1994

FILED

September 18, 1995

Cecil Crowson, Jr.

Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 v.)
)
 BARBARA JAMES,)
)
 Appellant.)

No. 03C01-9408-CV-00276
Jefferson County
Hon. William R. Holt, Jr., Judge
(Robbery)

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OPINION FILED: _____

REVERSED AND REMANDED

Joseph M. Tipton
Judge

OPINION

The defendant, Barbara James, appeals as of right from her conviction by a jury in the Circuit Court of Jefferson County for robbery, a Class C felony. She was sentenced as a Range I, standard offender to four years to be served in the custody of the Department of Correction. In this appeal as of right, she contends that the evidence is insufficient to support her conviction and that the trial court erred in instructing the jury relative to the elements of robbery.

The seventy-four-year-old victim, Allen Gray Huff, testified at trial that he went to bed around 10:00 p.m. on August 8, 1993, and left his back door unlocked. He stated that he awoke to find the codefendant, Eric Campbell, on top of him with a knife in his hand. The victim testified that a struggle ensued. He stated that when he told Campbell that he had a gun, Campbell grabbed a pair of the victim's pants from the floor and ran from the house. He stated that he could see Campbell by a light that he always kept on in his kitchen and that he had known Campbell since he was a child. He also stated that Campbell and the defendant had visited his house to use the phone a few days before the offense occurred. He testified that there was no money in the pants stolen from the bedroom floor.

On cross-examination, the victim testified that he had never had any problems with Campbell in the past and would have loaned him money if he had asked for it. He testified that he ran to both the front and back doors of his house when Campbell fled but did not see anyone or anything. He stated that he did not see the defendant's car anywhere on the night of the offense.

Ronnie Coleman, Constable of Jefferson County, testified that the victim called him around 11:00 p.m. on August 8th. He immediately drove to the victim's house. He testified that the victim's house is the only one on his street and that he

passed one vehicle on the way there. The vehicle was later identified as the defendant's. He testified that he observed tire tracks from the victim's street to the main highway. He stated that the next morning, he found the victim's pants about one hundred yards from where he had seen the defendant's car. He reported that he never found a knife.

Detective Sergeant G.W. Bud McCoig of the Jefferson County Sheriff's Department testified that during the course of his investigation of the offense he took statements from both the defendant and Campbell. He stated that the defendant initially told him that Campbell and she were riding around on August 8th and that Campbell never got out of her car. Later, she admitted that she and Campbell had been driving around when he asked her to let him out because he had to talk to some boy. She told the detective that she drove around for a few minutes, came back to where she had left Campbell and picked him up again. She told the detective that Campbell was not carrying a knife, gun or a pair of pants. Detective McCoig testified that he never found a knife. He also stated that he did not dust for fingerprints or search for footprints or tire tracks in conducting his investigation. He testified that Campbell initially denied that he ever got out of the defendant's car but admitted his guilt for the robbery in a subsequent statement.

Campbell testified and denied his guilt for the offense. He testified that he had been drinking on the night of the offense and that he and the defendant had been driving around when they began to argue. He told her to let him out because he had a friend "up the road" and could go there to call for a ride. Campbell testified that he went to the victim's house in order to use the phone and borrow ten dollars. He stated that he knocked on the victim's front and back doors. He entered through the unlocked back door when he thought he heard the victim tell him to come in. He stated that he walked halfway through the kitchen when the victim jumped up from the bed.

He said that the victim was startled and told him he had a gun. Campbell testified that he ran from the house.

Campbell stated that he never went into the victim's bedroom. He denied that he and the victim struggled. He denied having a knife and also denied taking the victim's pants as he ran from the house. He testified that his admission to Detective McCoig was involuntary and explained that he purposefully misspelled words in the statement to show that it was written under duress. He testified the defendant picked him up after he fled from the victim's house and convinced him to return to the car and go home with her. He stated that the defendant never knew he was going to the victim's house. He offered no explanation of why the victim's pants were found on the shoulder of the road near the location where the defendant's car was seen by Constable Coleman.

The defendant testified that she and Campbell were driving around on the night of the offense when they got into an argument and Campbell asked to be let out of the car. She said that she drove to a friend's house who was not home and returned to the spot where she had dropped off Campbell. She found him waiting on the side of the road and convinced him to go home with her. She denied any knowledge of a robbery and stated that Campbell was not carrying any weapons or any items from the victim's house when she found him. The defendant denied changing her version of the events from when she talked to Detective McCoig, claiming that she told him the same things, but he had failed to put them in her statement.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

To find the defendant guilty of robbery, the jury would have to conclude that the defendant was criminally responsible for an "intentional or knowing theft of property from the person of another by violence or by putting the person in fear." T.C.A. § 39-13-401(a). The defendant could be criminally responsible for the actions of Campbell, her codefendant, if the jury found that she acted "with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids or attempts to aid another person to commit the offense." T.C.A. § 39-11-402(2). In State v. Maxey, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting Hembree v. State, 546 S.W.2d 235, 239 (Tenn. Crim. App. 1976)), this court discussed the proof that is required to sustain a conviction for criminal responsibility and stated that "[it] is necessary that the defendant 'in some way associate himself with the venture, act with knowledge that an offense is to be committed, and share in the criminal intent of the principal in the first degree.'"

In this respect, the defendant basically argues that there was insufficient evidence to show that she knowingly or intentionally participated in the robbery of the victim. In the light most favorable to the state, though, the evidence shows that the

defendant drove Campbell to the area of the victim's house, either stayed in the area or left and returned and picked Campbell up after the robbery, and then gave a false statement or, at least, contradictory statements to Detective McCoig during his investigation of the offense. Guilty knowledge may be inferred from such things as false statements given as innocent explanation of actions occurring during the events being investigated. See State v. Shepherd, 862 S.W.2d 557, 564-65 (Tenn. Crim. App. 1992). Although far from overwhelming, the evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant had knowledge of and participated in the robbery in the role of the getaway driver. See, e.g., State v. Rodriguez, 752 S.W.2d 108, 111 (Tenn. Crim. App. 1988).

II

However, we conclude that the trial court erred in failing to instruct the jury regarding the need for the property to be taken "from the person of another." Such a taking is an essential element of robbery. T.C.A. § 39-13-401; see State v. Thien Duc Le, 743 S.W.2d 199, 201 (Tenn. Crim. App. 1987); State v. Howard, 693 S.W.2d 365 (Tenn. Crim. App. 1985); Harrell v. State, 593 S.W.2d 664, 669 (Tenn. Crim. App. 1979).

The state concedes that the trial court did not instruct the jury regarding the need for the taking of property to be "from the person of another" relative to robbery. However, it contends that the defendant's failure to bring this omission to the attention of the trial court during the giving of the jury instructions constitutes a waiver. It relies upon State v. Haynes, 720 S.W.2d 76, 85 (Tenn. Crim. App. 1986), for the proposition that a defendant may not complain on appeal about an omission in an instruction, absent making an objection or special request, if the instruction given was not erroneous, but was simply incomplete. Although we agree with this proposition, generally, it cannot apply when the trial court's instructions completely omit an

essential element of the offenses to be considered by the jury. See State v. Teel, 793 S.W.2d 236, 249, (Tenn.), cert. denied, 498 U.S. 1007 (1990). "[T]he court's duty to define and explain to the jury the elements of the offense charged in such a way that the jury can comprehend the charge is so basic and fundamental to a fair trial that it is incumbent upon the trial court to give such instructions whether requested or not." Casey v. State, 491 S.W.2d 90, 95 (Tenn. Crim. App. 1972).

The failure to instruct the jury that a robbery requires that the property be taken "from the person of another" effectively removed that element from the jury's consideration. In this sense, it operated as the equivalent of a directed verdict in violation of due process and the right to a jury trial. See Teel, 793 S.W.2d at 249-50; Hoover v. Garfield Heights Municipal Court, 802 F.2d 168, 177 (6th Cir. 1986), cert. denied, 480 U.S. 949 (1987). Also, short of the defendant admitting or stipulating to that element's existence, the complete failure to instruct the jury on any aspect of the element cannot be viewed to constitute harmless error beyond a reasonable doubt, if a harmless error analysis is even appropriate. See Teel, 793 S.W.2d at 249; Hoover, 802 F.2d at 174-178; Sullivan v. Louisiana, ___ U.S. ___, 113 S. Ct. 2078, 2081-82 (1993).

In this respect, the trial court's failure to instruct the jury as to an essential element of robbery constitutes plain error that requires a new trial. Accordingly, the defendant's conviction for robbery is reversed and the case is remanded for a new trial.

Joseph M. Tipton, Judge

CONCUR:

Gary R. Wade, Judge

Robert E. Burch, Special Judge