

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1995 SESSION

FILED
May 16, 1996
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

CHRIS BILLINGSLEY,

Appellant.

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C.C.A. NO. 01C01-9506-CC-00166

SEQUATCHIE COUNTY

HON. THOMAS W. GRAHAM,
JUDGE

(Burglary; Theft of Property)

FOR THE APPELLANT:

FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The defendant was charged in the indictment with one count of burglary and one count of theft of property valued over one thousand dollars (\$1,000). On May 17, 1994, he was convicted at a jury trial on both counts. The trial court imposed concurrent sentences of six years as a Range II multiple offender on each count. In this appeal as of right, the defendant presents the following five issues for review:

1. whether the trial court erred by failing to instruct the jury that Ronald Green was either an accomplice at law or an accomplice as a question of fact;
2. whether there was sufficient evidence and corroboration of accomplice testimony to support the defendant's convictions;
3. whether the trial court erred by refusing to instruct the jury pursuant to two of the defendant's requested instructions;
4. whether the trial court erred in sentencing the defendant as a Range II multiple offender; and,
5. whether the defendant should be granted a new trial based on newly discovered evidence pertaining to the testimony of Ronald Green.

We find that the defendant's issues lack merit, and his convictions and sentences are therefore affirmed.

The charges in the present case arose out of the theft of many items from the Cumberland Speciality Shop in Sequatchie County on June 20-21, 1993. The Cumberland Speciality Shop is a retail store located alongside Highway 127 in the city of Dunlap, Tennessee. Karen Phipps and Alfred Myers, the manager and the owner of the store respectively, both testified that when they arrived at the store on the morning of Monday, June 21, 1993, the front window had been broken and the back door had been unlocked. The store appeared to have been ransacked, and many articles of clothing as well as Nascar collectibles were missing. Phipps testified that the fair market value of the items missing was approximately seven thousand two hundred dollars

(\$7200). Myers testified that he had checked the store on Sunday, June 20, 1993, at approximately 6:00 or 6:30 p.m. and had found nothing out of the ordinary. Both Phipps and Myers testified further that they had not given anyone permission to remove any items from the store.

Lloyd Grant and Clyde Johnson, both law enforcement officers in Sequatchie County, testified that they had worked from the night of Sunday, June 20, 1993, to the morning of Monday, June 21, 1993. They testified further that they both knew the defendant and knew that he drove a white Chevy S10 pickup truck at the time. During their shifts, they both saw a white Chevy S10 pickup truck driving up and down Highway 127 in Dunlap several times. Although Grant could not identify the occupants of the truck, he did testify that it had appeared there were two individuals in the vehicle. On cross-examination, both officers testified that there were several white Chevy S10 pickup trucks in Dunlap, that they had never seen the truck in question near the Cumberland Speciality Shop on the night of June 20-21, and that young people generally drove up and down or "cruised" Highway 127 on a regular basis.

David Roberson, a deputy with the Sequatchie County Sheriff's Department, testified that he had spoken with Dane Sweeton between June 21 and June 24, at which time Sweeton denied any involvement in the theft from the Cumberland Speciality Shop. On June 24, 1993, Roberson accompanied Sheriff May to the home of the defendant's aunt, Ann Cartwright, located north of Dunlap just over the Sequatchie County line. They recovered several items from Cartwright's barn which had been taken from the Cumberland Speciality Shop. Upon further questioning, Sweeton admitted being involved in the theft with the defendant. He also stated that Ronald Green had been involved in the disposal of the stolen merchandise.

It was stipulated that one fingerprint matching Dane Sweeton's fingerprints was retrieved from a stolen clock discovered in Cartwright's barn. Other than that print, no other fingerprints of value were recovered from the merchandise discovered at Cartwright's barn.

Dane Sweeton, the admitted accomplice of the defendant, testified on behalf of the State. He stated that he had been driving around Dunlap on Sunday, June 20, 1993, when, at approximately 10:30 p.m., he encountered the defendant. Sweeton agreed to ride around with the defendant in the latter's white Chevy S10 pickup truck, and the two simply "cruised" around town for two to three hours. The defendant then asked Sweeton if he wanted to make some money, and Sweeton responded affirmatively. The defendant drove to the Cumberland Speciality Shop and shattered a front window of the business with a lug wrench. They left immediately and drove through town to ensure that no one had witnessed the breaking of the window. Shortly thereafter they returned to the store, drove the truck around to the back door, and loaded many articles of clothing and other collectibles into the bed of the truck. They then drove to a barn with which Sweeton was unfamiliar and unloaded the items from the truck, completing the task just before dawn on Monday, June 21, 1993. On the evening of June 21, the defendant asked Sweeton if the latter wanted to accompany him to Florida to sell the merchandise. Sweeton declined the offer, and the defendant told Sweeton that he had someone else he could ask to go with him. On cross-examination, Sweeton testified that he had five prior felony convictions. He also admitted that he had lied to police officers during his initial oral statement in which he denied involvement in the theft.

Ronald Green testified that he had been friends with the defendant for a couple of years. On June 24, 1993, the defendant came to Green's house in Marion County, Tennessee, and asked if he wanted to accompany the defendant to Florida to

see a stock car race. The defendant was driving a white Chevy S10 pickup truck which contained five bags of merchandise such as hats, jackets, and tee shirts with Harley-Davidson emblems. He told Green that the items were stolen merchandise which he had purchased from Dane Sweeton. Green accompanied the defendant to Florida, and the defendant sold the five bags of merchandise to an individual he met on one of the beaches in the vicinity for approximately five hundred dollars (\$500). Green testified that he had received none of the profit from the sale of the stolen merchandise.

The defendant's wife, Roxanna Billingsley, testified on his behalf at trial. She stated that the defendant had been out of their home on the evening of Sunday, June 20, 1993, but returned around midnight. Sometime later Dane Sweeton arrived at their home and asked the defendant if he could store some items in the basement. The defendant's wife protested, and the defendant told Sweeton that he could not store anything in the house. Sweeton then left without putting any items in the basement. On cross-examination, Mrs. Billingsley admitted that although law enforcement officials investigated the offenses for nearly three months, she never mentioned Dane Sweeton's alleged late-night visit to the police during the investigation.

In his first issue the defendant complains that the trial court erred by failing to instruct the jury that Ronald Green was either an accomplice at law or an accomplice as a question of fact. The trial court instructed the jury on the need for corroboration of accomplice testimony, generally following the appropriate Tennessee Pattern Jury Instruction. In addition, the trial court specifically charged the jury that Dane Sweeton was an accomplice of the defendant and, therefore, his testimony must be corroborated. The trial court did not mention Ronald Green in the instructions pertaining to corroboration of accomplice testimony. The defendant contends that the fact that Green and the defendant were friends and that Green accompanied the defendant to see a

stock car race in Florida, admittedly knowing that the merchandise contained in the defendant's truck was stolen, merits a jury instruction to the effect that Green was an accomplice at law or that Green's role as a possible accomplice was a question of fact for the jury to resolve.

An accomplice is an individual who knowingly, voluntarily, and with common intent unites with the principal offender in the commission of a crime. See Clapp v. State, 94 Tenn. 186, 30 S.W. 214, 216 (1895); State v. Lawson, 794 S.W.2d 363, 369 (Tenn. Crim. App. 1990). The question of who determines whether an individual is an accomplice depends upon the particular facts of each case. When an individual's participation in a criminal offense or lack thereof is clear and undisputed, the question of who is an accomplice is one for the trial court to decide. When, however, the facts of an individual's participation in a criminal offense are in dispute or are susceptible of an inference that the individual may or may not be an accomplice, the question of who is an accomplice is one for the jury to decide. See Lawson, 794 S.W.2d at 369; Bethany v. State, 565 S.W.2d 900, 903 (Tenn. Crim. App. 1978).

In the present case, although the defendant goes to great lengths to compare his situation to a number of cases in which Tennessee courts have required an instruction on accomplice as a question of fact, there is simply no factual question as to Ronald Green's lack of involvement in the burglary and theft of merchandise from the Cumberland Speciality Shop in Sequatchie County on June 20-21, 1993.¹ Green himself testified that he had encountered the defendant and the stolen merchandise for the first time on June 24, 1993, at the former's home in Marion County. The defendant, through the testimony of his wife, relied primarily on an alibi defense and implied that Dane

¹ The defendant cites the following cases in support of his argument: Ripley v. State, 227 S.W.2d 26, 29 (Tenn. 1950); State v. Anthony, 836 S.W.2d 600, 603-604 (Tenn. Crim. App. 1992); Conner v. State, 531 S.W.2d 119, 123-125 (Tenn. Crim. App. 1975); and, Pennington v. State, 478 S.W.2d 892, 898 (Tenn. Crim. App. 1971).

Sweeton was responsible for the crimes. There was no testimony offered by anyone at trial which implicated Green in the June 20-21 events. Our review of the record reveals that there is no evidence even suggesting that Green was involved in the June 20-21 burglary and theft of the Cumberland Speciality Shop.

If the defendant had been charged with theft of property by exercising control on June 24, the day that he met Green and drove to Florida to sell the stolen merchandise, then there would have been a factual question as to Green's involvement in the crime. In that case, it would have been appropriate for the trial court to instruct the jury that they should determine whether Green was an accomplice. In the case at bar, however, a host of pre-trial motions narrowed the time of the alleged offenses to between 6:30 p.m. on June 20, 1993, and 9:30 a.m. on June 21, 1993. From a review of the entire record, we can only conclude that there is no factual question as to Green's lack of involvement in the charged offenses. As a result, the trial court properly refused to instruct the jury regarding Green's alleged role as an accomplice. The trial court's instruction pertaining to accomplice testimony was a correct and adequate statement of the law and, thus, the defendant's first issue lacks merit.

In his second issue the defendant contends that there was insufficient evidence and corroboration of accomplice testimony to support his convictions. Specifically, the defendant claims that Green's testimony is so unrelated to Sweeton's testimony that it does not corroborate Sweeton with respect to the elements of the charged offenses. As a result, the defendant argues that the corroborating evidence is legally insufficient.

The rule is well settled in Tennessee that a defendant cannot be convicted on the uncorroborated testimony of an accomplice. Sherrill v. State, 204 Tenn. 427, 321

S.W.2d 811, 814 (1959). An accomplice is defined as "a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime." Clapp v. State, 94 Tenn. 186, 30 S.W. 214, 216 (1895). To corroborate the testimony of an accomplice, "there should be some fact testified to, entirely independent of the accomplice's evidence, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it." Clapp, 30 S.W. at 216. This corroboration must consist of some fact or circumstance which affects the identity of the defendant. The necessary corroboration, however, need be only rather slight circumstances. See, e.g., Bethany, 565 S.W.2d at 904 (citing Garton v. State, 332 S.W.2d 169 (Tenn. 1960); Alexander v. State, 229 S.W.2d 331 (Tenn. 1950)). Furthermore, the jury is to determine the degree of evidence necessary to corroborate the testimony of an accomplice, and it is sufficient "if there is some other evidence fairly tending to connect the defendant with the commission of the crime." Clapp, 30 S.W. at 217.

In the present case, Sweeton testified that he and the defendant had broken into the Cumberland Speciality Shop and stolen merchandise on June 20-21, 1993. They placed the merchandise in the defendant's white Chevy S10 pickup truck and later concealed it in a barn. Two law enforcement officers testified that they had seen a white Chevy S10 pickup truck driving up and down Highway 127, the road fronting the Cumberland Speciality Shop. Police officers later recovered some of the stolen merchandise from a barn which was owned by the defendant's aunt. Ronald Green testified that he had seen several bags containing merchandise matching the description of items stolen from the Cumberland Speciality Shop in the defendant's truck. Green testified further that the defendant had stated that the items were stolen.

Taken together, we find that this evidence sufficiently corroborates the

testimony of the defendant's accomplice, Dane Sweeton. Possession of recently stolen merchandise gives rise to an inference that the possessor has stolen the merchandise. It is also sufficient corroboration to support a conviction for burglary. See State v. Hamilton, 628 S.W.2d 742, 746 (Tenn. Crim. App. 1981); Smart v. State, 544 S.W.2d 109, 110-111 (Tenn. Crim. App. 1976); Brown v. State, 489 S.W.2d 855, 856 (Tenn. Crim. App. 1972). The defendant makes much of Green's testimony that he told Green that he had purchased the stolen merchandise from Sweeton. Yet the circumstantial force of the inference which arises from possession of recently stolen merchandise does not simply vanish in light of the defendant's alleged statement to Green. Instead, it is the jury's duty to weigh the inference against the defendant's explanation. See Bush v. State, 541 S.W.2d 391, 395 (Tenn. 1976). From the verdict of guilt, it is apparent that the jury rejected the defendant's explanation. Based on our review of the record, we can only conclude that there is sufficient corroborating evidence which tends to connect the defendant with the commission of the charged offenses. The defendant's second issue is therefore without merit.

In his third issue the defendant contends that the trial court erred by refusing to instruct the jury pursuant to two of the defendant's requested instructions. The first such special request instructed the jury that the testimony of an "informant," defined primarily as an individual who chooses to testify by agreement with the government in order to escape punishment, must be examined with greater scrutiny than an individual whose testimony is not motivated by self-interest. The requested instruction then identified Dane Sweeton as an informant.

The defendant's requested instruction ignores the fact that Dane Sweeton specifically testified at trial that he had no agreement with the government regarding his testimony. Moreover, the trial court instructed the jury on their role as the judges of the

credibility of a witness. In that instruction, the trial court identified the interest or lack of interest of a witness in the outcome of the trial and any potential bias of a witness as worthy considerations in the jury's evaluation of credibility. We conclude that the trial court's instruction on credibility adequately addressed the defendant's concerns expressed in his special request regarding "informant" credibility.

The second special request of which the defendant complains on appeal involved the effect of a felony conviction on witness credibility. The requested instruction informed the jury that the testimony of a witness may be discredited or impeached by evidence revealing that the witness has been convicted of a felony. The trial court's general instruction on credibility, however, advised the jury that the general character of a witness as well as evidence concerning a witness' reputation for truth and veracity are proper considerations in the jury's evaluation of credibility. Furthermore, at trial the defendant ably focused the jury's attention on the criminal records and reputations for truthfulness of various witnesses, especially Dane Sweeton. We find that the trial court's instruction regarding witness credibility fully and fairly stated the applicable law. As a result, the trial court properly denied the defendant's special requests concerning informant credibility and the effect of a felony conviction on witness credibility. See e.g., State v. Bryant, 654 S.W.2d 389, 390 (Tenn. 1983). Accordingly, the defendant's third issue lacks merit.

In his fourth issue the defendant contends that the trial court erred in sentencing the defendant as a Range II multiple offender. He argues that his prior class E felony conviction for petit larceny in 1988 should not have been considered in calculating his sentencing range because that crime would today constitute only a class A misdemeanor. The defendant, however, concedes that this Court recently rejected this argument in State v. Wright, 836 S.W.2d 130 (Tenn. Crim. App. 1992). He therefore

asks this Court to revisit the issue and to reverse Wright. We decline to alter the holding in Wright.

The Criminal Sentencing Reform Act of 1989 defines a multiple offender in T.C.A. § 40-35-106. In determining the number of prior felony convictions a defendant has received, “[a]ll prior felony convictions, including those occurring prior to November 1, 1989, are included.” T.C.A. § 40-35-106(b)(2) (1990). As this Court stated in Wright, the legislature “was aware that some offenses which were felonies under prior law were no longer felonies under the new Act. There appears to be no doubt that the legislature intended to permit consideration of all prior felony convictions occurring during the defendant’s life.” Wright, 836 S.W.2d at 136. Thus, in the present case, the trial court properly considered the defendant’s 1988 petit larceny conviction as a prior felony for purposes of determining the appropriate sentencing range. The defendant’s fourth issue is without merit.

In his fifth and final issue the defendant claims that he should be awarded a new trial based on newly discovered evidence pertaining to the testimony of Ronald Green. Specifically, the defendant informed his counsel shortly after the conclusion of the trial that (1) Ronald Green had paid for the trip to Florida, (2) Green had in fact sold the stolen merchandise while the defendant was in jail, and (3) Green had received half of the four hundred fifty dollars (\$450) profit from the sale of the stolen merchandise. The defendant allegedly did not mention these facts to his counsel before or during trial because he wanted “to avoid getting anyone else in trouble.” He now contends that these additional facts cast doubt on Green’s credibility and role as an accomplice. As a result, he argues that this evidence might easily have changed the result of the trial, especially given the key role Green played in the corroboration of Dane Sweeton’s testimony.

In seeking a new trial based on newly discovered evidence, the defendant must establish (1) reasonable diligence in attempting to discover the evidence; (2) materiality of the evidence; and (3) that the evidence would likely change the result of the trial. See State v. Nichols, 877 S.W.2d 722, 737 (Tenn. 1994) (citing State v. Goswick, 656 S.W.2d 355, 358-360 (Tenn. 1983)). In order to show reasonable diligence, the defendant must demonstrate that neither he nor his counsel had knowledge of the alleged newly discovered evidence prior to trial. See Jones v. State, 2 Tenn. Crim. App. 160, 452 S.W.2d 365, 367 (1970). The granting or refusal of a new trial on the basis of newly discovered evidence rests within the sound discretion of the trial court. Hawkins v. State, 220 Tenn. 383, 417 S.W.2d 774, 778 (1967).

In the present case, the defendant admits that he was fully aware of the “newly discovered” evidence regarding Ronald Green’s testimony even before trial. Given the defendant’s personal knowledge of the facts at issue, we cannot conclude that the defendant has exercised reasonable diligence in presenting the “newly discovered” evidence. Accordingly, we agree with the trial court’s order denying a new trial on the basis of newly discovered evidence. The defendant’s fifth issue is not meritorious.

For the reasons stated in the foregoing discussion, we find that the defendant’s issues on appeal lack merit. We therefore affirm his convictions and his sentences.

JOHN H. PEAY, Judge

CONCUR:

JOE B. JONES, Presiding Judge

JOSEPH H. WALKER, III, Special Judge