IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1995 SESSION

STATE OF TENNESSEE,	)	C.C.A. No. 01C01-9407-CR-00235
	)	
APPELLEE,	)	DAVIDSON COUNTY
	)	
VS.	)	Hon. Walter C. Kurtz
	)	
JAMES MICHAEL PITTS,	)	(Three counts of Delivery of Cocaine in excess of .5 grams; four counts of Delivery of Cocaine in excess of 26 grams, and one count of Delivery of Cocaine in excess of 300 grams)
	)	
APPELLANT.	)	
	)	
	)	
	)	

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OPINION FILED: _____

AFFIRMED IN PART; REVERSED AND DISMISSED IN PART

REX HENRY OGLE, SPECIAL JUDGE

O P I N I O N

On March 18, 1993, James Michael Pitts was indicted by a Davidson County Grand Jury, as follows: Counts One, Two, and Three, Delivery in excess of .5 grams of cocaine; Counts Four, Five, Six, and Seven, Delivery in excess of 26 grams of cocaine; and Count Eight, Delivery in excess of 300 grams of cocaine. The case was tried before a jury on December 1, 1993, and the jury returned a verdict of guilty on all counts of the Indictment.

On February 18,1994, the Trial Court sentenced the defendant as follows:

(1) Count One: Eighteen years, Range Two, Multiple Offender, $20,000 fine.

(2) Count Two: Eighteen years, Range Two, Multiple Offender, $4,000 fine.

(3) Count Three: Eighteen years, Range Two, Multiple Offender, $1,000 fine.

(4) Count Four: Eighteen years, Range Two, Multiple Offender, $20,000 fine.

(5) Count Five: Eighteen years, Range Two, Multiple Offender, $2,000 fine.

(6) Count Six: Eighteen years, Range Two, Multiple Offender, $1,000 fine.

(7) Count Seven: Eighteen years, Range Two, Multiple Offender, $2,000 fine.

(8) Count Eight: Twenty-Two years, Range One, Standard Offender, $50,000 fine.

Counts One, Two, and Three are to be served concurrently with each other but consecutively to the sentence the defendant was already serving. Counts Four and Five were ordered to be served concurrently with each other but consecutively to Counts One, Two, and Three. The sentences in Counts Six and Seven were ordered to be served concurrently with each other but consecutively to Counts Four and Five. The sentence in Count Eight was ordered to be served consecutively to Counts Six and Seven. The defendant's aggregate sentence is Seventy-Six years and a fine of $100,000.

In this appeal as of right, the defendant makes two claims. First, he contends that there was insufficient corroboration of the accomplices' testimony to support a

conviction with regard to Counts One, Two, Three, Four, Six, and Seven.[1] Second, the defendant claims that the trial court erred in allowing testimony relating to other crimes or uncharged conduct committed by the defendant. We agree with the defendant that the evidence is insufficient as to Counts One, Three, Four, Six, and Seven, thus, the judgment of the trial court is reversed and dismissed as to these counts. We affirm the judgment as to Counts Two, Five, and Eight.

In September, 1991, Officer Nicky Watson was contacted by Officer Phillip Taylor regarding a Davidson County Drug Task Force undercover operation. The target of the operation was the defendant, James Michael Pitts. The Task Force had received information that Darlene Green was being supplied cocaine by the defendant. Therefore, Officer Watson's objective was to get near the defendant through Ms. Green with the help of an informant known as Little Mike.

Officer Watson's first encounter with Ms. Green occurred in September, 1991, after Little Mike ordered one ounce of cocaine from Ms. Green.[2] Officer Watson met with Ms. Green in a driveway at Revels Street in Nashville to discuss the price of the ounce of cocaine and concluded that a price of $1,200 was fair. On September 6, 1991, Officer Watson met with Ms. Green to make the transaction. Officer Watson handed Ms. Green a green shopping bag with $1,200 in it. Ms. Green took the money and said she would be back in a few minutes. Ms. Green testified that she went to the defendant's residence to obtain the cocaine.[3] Ms. Green later returned to the scene with one ounce of cocaine in the green paper bag, and the exchange was made. The Drug Task Force equipped Officer Watson with both a tape recorder and a body wire so that a surveillance team could hear and tape the transaction between Officer Watson and Ms. Green.

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[1] The defendant concedes that there is sufficient corroboration as to Counts Five and Eight.

[2] Ms. Green testified that Little Mike was Ms. Green's best friend's boyfriend and that the two of them had been friendly for years. Little Mike told Ms. Green that Jazz (Officer Watson's codename) was a good friend of his that worked with him. He also told Ms. Green that Jazz wished to purchase one ounce of cocaine. Ms. Green refused at first but after contacting her friend Alvin Hall, agreed to purchase the cocaine from the defendant for Jazz.

[3] Ms. Green also testified that the defendant was her only source of cocaine, however, under cross-examination, she admitted that she had obtained small amounts of cocaine from other sources on a few occasions.

On September 11, 1991, Little Mike contacted Ms. Green about making another purchase of cocaine. This transaction was very similar to the first except in three significant regards. Like the first transaction, Ms. Green agreed to sell one ounce of cocaine to Jazz, but this time, she wanted and received $1,300. Like the first transaction, the transaction was recorded, and Ms. Green took the money and then left to get the cocaine, but in this situation, Officer Watson saw Ms. Green drive away down Lane Court (the cul-de-sac on which the defendant and Ms. Green lived) and return minutes later with an ounce of cocaine which she testified she had obtained from the defendant's house. In addition, she told the defendant that she was obtaining the cocaine for her uncle. Unlike the first transaction, Alvin Hall went with Ms. Green to the drug transaction with Officer Watson and testified that the money was returned to the defendant.

Both the third and fourth transactions were practically identical. On September 15 and 21, 1991, Officer Watson contacted Ms. Green regarding other cocaine sales. These transactions had both similarities and differences to the first two transactions. Like the second transaction, one ounce of cocaine was sold to Officer Watson for $1,300, the transaction was recorded, Alvin Hall was present, and Ms. Green claims to have obtained the cocaine form the defendant. Unlike the other transactions, these took place in a church parking lot, and this time, Ms. Green had the cocaine with her so there was no delay.

On September 26, 1991, Officer Watson contacted Ms. Green about purchasing two ounces of cocaine for $2,600. The tape-recorded transaction took place once again in the church parking lot, and Ms. Green had the cocaine with her.[4] Ms. Green testified once again that she obtained the cocaine from the defendant's house. In response to Officer Watson's requests to find out the identity of Ms. Green's supplier, Ms. Green enclosed an envelope with the defendant's address on it in the sack of cocaine. In addition, Officer Rigsby testified that he saw Ms. Green go to the defendant's house and

[4] Alvin Hall and two other men were also present at this transaction.

return with a brown paper sack. The cocaine delivered by Ms. Green to Officer Watson was in a brown paper sack.

The sixth tape-recorded transaction was similar to the fifth. On October 2, 1991, Officer Watson contacted Ms. Green about the sale of two ounces of cocaine for $2,600. The meeting took place at the church parking lot, but when Ms. Green spotted a police car in the area, she, Mr. Hall, and another male took Officer Watson to a nearby apartment complex to complete the transaction. Ms. Green once again testified that she obtained the drugs from the defendant.

Immediately following the transaction, Officer Watson requested another two ounces (in exchange for $2,600), and six days later the seventh tape-recorded transaction took place at an Exxon gas station. Ms. Green and Mr. Hall both testified that they obtained the drugs from the defendant at a nearby Burger King.

On January 11, 1991, the defendant contacted the narcotics squad and indicated he wanted to talk with them. Oblivious to the fact that he was a target of their investigation, the defendant indicated that he wanted to help the police by telling them about his drug suppliers, Lee Staples and Paul Woods. He explained that Mr. Staples would supply him with drugs in excess of half a kilo of cocaine at a time.

On January 13, 1992, Officer Watson contacted Ms. Green about purchasing half a kilo of cocaine for $17,000. They agreed to meet on January 25, 1991. But, the meeting and transaction never took place because when Officer Watson had not arrived 10 minutes after the agreed upon time, Ms. Green and Mr. Hall left. Ms. Green testified that she obtained the cocaine from the defendant in seventeen one ounce baggies but later returned the baggies of cocaine to him when the deal fell through. This testimony is supported by a video recording taken by Officer Rigsby of Ms. Green walking over to the defendant's house and leaving with a brown paper sack and later in the day returning to the defendant's house with a similar looking sack.

After this last transaction, the police, led by Sergeant McWright and Officer Eddings, obtained search warrants and searched both Ms. Green's and the defendant's houses. They did not discover any drugs or drug paraphernalia in Ms. Green's house. When they arrived at the defendant's house, the defendant answered the door and was read his Miranda rights. According to Sergeant McWright, the defendant exclaimed "you can search. There's nothing here. I flushed what I had. I knew you were coming." In their search, the police found seventeen cut open, washed baggies in the sink, a revolver, a sophisticated security system, and expensive electronics equipment.

In his first issue, the defendant asserts that he should not have been convicted of these crimes because there was no evidence to support the testimony of Darlene Green and Alvin Hall, his accomplices. This claim is based upon the general proposition that a defendant cannot be convicted upon the uncorroborated testimony of accomplices. Sherrill v. State, 204 Tenn. 427, 321 S.W.2d 811 (1959); Prince v. State, 529 S.W.2d 729, 732 (Tenn. Crim. App. 1975). An accomplice is defined as a person who knowingly, voluntarily, and with common intent with the principal offers to unite in the commission of a crime. Clapp v. State, 94 Tenn. 186, 188, 30 S.W. 214, 216 (1895); Letner v. State, 512 S.W.2d 643, 647 (Tenn. Crim. App. 1974).

The rule is that there must be some fact testified to which is entirely independent of an accomplice's testimony; that fact, taken by itself, must lead to an inference that a crime has been committed and that the defendant is responsible therefor. State v. Fowler, 213 Tenn. 239, 373 S.W.2d 460, 463 (1963). This requirement is met if the corroborative evidence fairly and legitimately tends to connect the accused with the commission of the crime charged. Marshall v. State, 497 S.W.2d 761, 765 (Tenn. Crim. App. 1973). Only slight circumstances are required to furnish the necessary corroboration. Garton v. State, 206 Tenn. 79, 332 S.W.2d 169, 175 (1960). To be corroborative, the evidence need not be adequate in and of itself to convict. Conner v. State, 531 S.W.2d 119 (Tenn. Crim. App. 1975).

The rationale for this rule relating to corroboration is stated in the case of State v. Eads, No. 01C01-9307-CC-00229, 1995 WL 382440 (Tenn. Crim. App. June 28, 1995). In Eads, this Court, quoting Wigmore, stated that "the reasons which have led to the distrust of accomplices testimony are not far to seek. He may expect to save himself from punishment by procuring the conviction of others... It is true that this promise of immunity or leniency is usually denied, and may not exist; but it is always suspected. The essential element, however, must be remembered, is this supposed promise or expectation of clemency." Id. at *5 (quoting 3A WIGMORE, EVIDENCE Sec. 2057 at 417 (Chadbourn rev. 1970)).

The defendant makes two interrelated arguments with respect to sufficient corroboration. First, the defendant argues that the trial court inappropriately bootstrapped all of the counts against him. As a result, the trial court erroneously allowed corroboration evidence from Counts Five and Eight to be used to corroborate on the other six counts. Second, the defendant argues that since the State presented no corroborative evidence relating to Counts One, Two, Three, Four, Six, and Seven, he should have been acquitted on these counts.

In response, the State claims that since the defendant's multiple offenses arise out of a pattern of similar conduct, that corroboration from two counts can be used as corroboration for the other counts. The State relies on the case of Bethany v. State. 565 S.W.2d 900 (Tenn. Crim. App. 1978). We find that Bethany is factually distinguishable and that the reasoning in Bethany should not be extended to the case at hand.

In Bethany, this Court held that "in prosecution for engaging in fellatio with six of seven boys who defendant took on a camp-out, the testimony of the seventh boy, who did not participate in any offense, that he saw defendant commit offenses upon four of the six boys was sufficient to corroborate the testimony of the alleged accomplices as to those four offenses and could be considered corroborative evidence" for the other two

counts. Bethany, 565 S.W.2d at 904.

Bethany v. State is distinguishable from the case at hand in many respects. In Bethany, (1) the defendant was actually seen committing the crime on four of the six boys; (2) the defendant took the boys on a camp outing; (3) the crimes all took place at the same camp outing, and (4) the defendant was the sole adult at the camp. Id. at 901-902. In the case at hand, the defendant (1) was never seen supplying any drugs to Ms. Green, and in fact, there was not even any corroborative evidence that the defendant was even home when the transactions took place; (2) Ms. Green testified that she had obtained drugs from people other than the defendant; and (3) the events transpired over a four month period. It appears that the level of the corroborative evidence in the case at hand fails to rise to the level found in Bethany, and thus, under Bethany, the evidence in this case does not constitute sufficient corroboration.

The next question which must be addressed is whether the reasoning of Bethany should be extended to the case at hand. This involves an analysis of both the degree in which Bethany has been extended by later case law and the consistency of the Bethany rationale with respect to the law concerning the corroboration of accomplice testimony. In the case of State v. Street, this Court refused to extend the Bethany analysis to a larceny case finding that corroboration established in one larceny is not permitted to serve as corroboration for other larcenies. State v. Street, No. 56, (Tenn. Crim App. Jan 9, 1984).

Because Bethany has not been extended, we must look to general principles concerning corroborative evidence and the law in general. As mentioned above, an accomplice's testimony requires independent and sufficient corroboration for each count charged against the defendant. State v. Fowler, 373 S.W.2d 460, 463. The purpose of this requirement is to prevent the piling up of charges against a defendant with a bad reputation by an accomplice who hopes to get a reduced sentence. Eads, 1995 WL at *5. Therefore, this requirement shuns the 'bootstrapping' of charges. In addition, the State is

required to prove every element of every crime charged, and this burden specifically includes the identity of the defendant as the person who committed the crime for which he is tried. State v. Dyle, 899 S.W.2d 607,612 (Tenn. 1995). Allowing this type of 'bootstrapping' would violate this requirement by allowing a defendant to be convicted of a crime solely on the testimony of an accomplice for which the State presented no independent evidence to corroborate the defendant's guilt. Therefore, the Bethany analysis cannot be extended to the case at hand, and the State was required to present independent corroborative evidence of the testimony of Ms. Green and Mr. Hall for each of the eight counts on which the defendant is charged.

As discussed above, in order to sufficiently corroborate the testimony of an accessory there must exist evidence which is entirely independent of an accomplice's testimony; that fact, taken by itself, must lead to an inference that a crime has been committed and that the defendant is responsible therefor. State v. Fowler, 373 S.W.2d 460, 463. To be sufficient, the corroborative evidence need only be slight. Garton v. State, 332 S.W.2d 169, 175.

In the case of State v. Fowler, the state produced sufficient corroborative evidence by showing that the defendant was seen talking with the three other accomplices, the defendant's car was identified near the crime scene, and witnesses saw four men drive away with the stolen truck. 373 S.W.2d at 463. See also, State v. Copeland, 677 S.W.2d 471, 475 (the defendant was seen going to the accessory's house to pick him up right before the incident); State v. Sparks, 727 S.W.2d 480, 483 (Tenn. 1987) (testimony of two officers who overheard the telephone call between the defendant and the accomplice) ; and Proctor v. State, 565 S.W.2d 909, 914-915 (Tenn. Crim. App. 1978) (the defendant was positively identified by the robbery victim).

In cases in which the state only produced a scintilla of corroborative evidence, the courts have held that the evidence was insufficient as a matter of law. For example, in the case of Mathis v. State, the Supreme Court held that witness testimony

that the defendant was in the vicinity of the murder scene was not sufficient. 590 S.W.2d 449, 454-455 (Tenn. 1979). See also, Gable v. State, 519 S.W.2d 83, 84-85 (Tenn. Crim. App. 1974) (the fact that the defendant gave his jacks to two men who were stealing someone's car was insufficient where there was no evidence alluding to the fact that the defendant knew the men were stealing the car); and Boaz v. State, 537 S.W.2d 716, 718 (Tenn. Crim. App. 1975) (testimony that the defendant left in the direction of the accomplices home was insufficient). Therefore, the State must present more than just a scintilla of corroborative evidence to send the issue to a jury.

The defendant concedes that there exists sufficient corroboration as to Counts Five and Eight. With respect to Count Five, the state presented corroborative evidence that the cocaine delivered from Darlene Green to Officer Watson was contained in a brown sack which also included an envelope addressed to the defendant. This transaction arose after numerous requests by Officer Watson to find out the identity of Ms. Green's supplier. In addition, to further corroborate the testimony of Ms. Green and Alvin Hall, the state presented the testimony of Officer Rigsby who saw Ms. Green go to the defendant's house and return with a brown paper sack. The cocaine was then delivered in a brown paper sack. This corroborative evidence was correctly judged sufficient by the trial court, and thus, the jury's verdict with respect to Count Five must be affirmed.

With respect to Count Eight, the state presented evidence of video surveillance taken by the police showing Ms. Green walking to the defendant's house to obtain cocaine and then returning later that day. In addition, during the search of the defendant's house, the police found seventeen empty plastic baggies. Darlene Green testified that she had obtained 17 one ounce baggies of cocaine from the defendant and then had returned them to him when she got nervous about the transaction. Also, when the police executed a search warrant at the defendant's house, the defendant told them he had flushed what he had down the toilet. This evidence was clearly sufficient to corroborate the accomplices' testimony as to this count. Therefore, the verdict of the jury must be affirmed at to Count Eight.

With respect to Count Two, the state presented testimony by Officer Watson that he saw Ms. Green drive down Lane Court (the cul-de-sac on which the defendant lived) and then minutes later return with one ounce of cocaine. This evidence by itself is weak, especially since Ms. Green lived on the same street. But when this evidence is coupled with the fact that the defendant admitted to the police that he was a drug dealer and with the fact that the search of Ms. Green's house did not produce even a trace of evidence of drugs, it is sufficient to serve corroborative purposes. It is not necessary that corroborative evidence be adequate in and of itself to convict. McKinney v. State, 552 S.W.2d 787, 789. This Court in the case of McKinney v. State stated that "the question of corroboration of an accomplice's testimony is for the jury to determine." Id. at 789. As long as there exists some corroborative evidence for which a jury can reasonably infer a connection between the defendant and the crime, the sanctity of the jury's decision must be preserved. Id. at 789-90. Therefore, the jury's verdict with respect to Count Two must be affirmed.

With respect to the other counts, the state merely presents as corroborative evidence the admission of the defendant that he was a drug dealer. This evidence does not meet the requirement that corroborative evidence must specifically link the defendant to the specific crime. Holding that this type of evidence is sufficient to corroborate multiple counts would effectively eliminate the requirement of corroborative proof. Because the state failed to present any corroboration of Ms. Green's testimony as to these counts, the convictions cannot stand. Thus, the defendant's convictions with regards to Counts One, Three, Four, Six, and Seven are reversed and dismissed.

In the defendant's second issue, he claims that the trial court erred in allowing the testimony of Officer Berryman relating to other crimes or bad acts committed by the defendant to be presented to the jury. It is the defendant's contention that this evidence should have been excluded because the prejudicial effect of such testimony far outweighed any probative value it might contain. Specifically, the defendant complains that

Officer Berryman should not have been allowed to testify that the defendant told him that he had purchased large amounts of cocaine from Lee Staples.

First, we note that the defendant's statements were a party admission, which is a hearsay exception under Tennessee Rules of Evidence 803(1.2).2. Under this exception, a statement offered against a party that is "'the party's own statement in either an individual or a representative capacity' is admissible hearsay. This means that any assertion a party spoke, wrote, or did may be used against that party as an admission." NEIL P. COHEN, SARAH Y. SHEPPEARD and DONALD F. PAINE, TENNESSEE LAW OF EVIDENCE, at 513-515 (3d ed. 1995). In the case at hand, the testimony in question relates to information that the defendant directly told Officer Berryman. Therefore, under Rule 803(1.2)(A), the defendant's statements are admissible.

Under Tennessee Rules of Evidence 404(a), evidence of a person's character is not admissible to prove the person acted in accordance with that character at a particular time. The effect of this general rule though is greatly diminished by the exceptions stated in Rule 404(b). Rule 404(b) allows other crimes, wrongs, or acts to be introduced for purposes other than to prove character. The other act may be admitted "to prove such issues as motive, intent, knowledge, absence of mistake or accident, common scheme or plan, identity, completion of the story, opportunity, and preparation." COHEN, SHEPPEARD and PAINE, supra, at 169. The theory behind this exception is that "'other act' evidence is not banned by the rule barring character evidence because the other acts are not used to prove that a person acted in conformity with character... Rather, the other acts are used for some non-character issue, such as proof of motive or common scheme or plan." Id. at 170. Under Rule 404(b), when assessing whether certain evidence is admissible under Rule 404(b) the court must first hold a jury out hearing upon the request of either party. Here, the defendant failed to object to the testimony or to request a hearing on the probative value of such testimony.

Rule 36(a) of the Tennessee Rules of Appellate Procedure requires that in

order for a party to be granted relief, the party must "take whatever action was reasonably available to prevent or nullify the harmful effect of the error." T.R.A.P. 36(a). If the party fails to do so, the claim is considered to be waived. This waiver provision was explicitly extended to Rule 404(b) claims in the case of State v. Copenny in which this Court held that the appellant waived the issue by failing to make a timely objection. State v. Copenny, 888 S.W.2d 450, 456 (Tenn. Crim. App. 1993).

In the case at hand, the defendant clearly waived any Rule 404(b) claim he may have had. The defense in its brief alludes to the fact that defense counsel did not request a jury out hearing on the admissibility of Officer Berryman's testimony. Moreover, there was no objection to the testimony. In fact, it was not raised until the defendant's motion for a new trial. This inaction with respect to Rule 404(b) constitutes a waiver, and thus, the defendant's claim is lost. T.R.A.P. 36(a). Therefore, this issue is without merit.

In conclusion, Counts Two, Five, and Eight are affirmed, and Counts One, Three, Four, Six, and Seven are reversed and dismissed. This case is remanded to the trial court for proceedings consistent with this opinion.

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REX HENRY OGLE, SPECIAL JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOHN H. PEAY, JUDGE